80-1190

No.

Supreme Court, U. S.
FILED
JAN 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAMUEL H. BURR
C. V. STELZENMULLER
1600 Bank for Savings Building
Birmingham, Alabama 35203

F. B. SNYDER
200 South Michigan Avenue
Chicago, Illinois 60604
Attorneys for Petitioner
Pullman-Standard

THOMAS, TALIAFERRO, FORMAN, BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
Of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on this case on August 18, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below apply wrong legal criteria in determining the bona fides of the seniority system?

2. Did the Court below err in failing to apply a "but for" test in determining the bona fides of the Steelworkers' seniority system?

3. Did the Court below err in refusing to allow refusals by black employees of promotions to supervisory positions, to be taken into account in evaluating the statistical evidence?

4. Did the Court below err in holding its "business necessity" criterion essential to defending against a claim of discrimination based on promotion statistics, to the exclusion of non-discriminatory causes, thereby improperly imposing involuntary promotion quotas?

PARTIES[1]

Information under Rule 28.1: Pullman, Inc. became a wholly owned subsidiary on November 6, 1980, of its present parent, Wheelabrator-Frye, Inc.; its subsidiaries (other than wholly owned) are as follows: Baksh-Pullman Kellogg Ltd.; KUB Co. Ltd.; High Concrete Engineering; Kellogg Continental B.V.; Kellogg Continental Construction B.V.; Pullman Swindell Mexicana S.A. de C.V.; and Trailor, S.A.; its only affiliates are the other subsidiaries of Wheelabrator-Frye, Inc., namely: Abrasive Finishing Co.; Bell Aluminum Corporation; Bell Financial Corporation; Belcom Resources Company; Benfur Engineering Company; Frye Copy-Systems, Inc.; Garden City Fan & Blower Co.; Moore International, Inc.; MPB Corp.; National Industrial Constructors, Inc.; Neptune International Corporation; Pershing Park, Inc.; Planning & Service Corporation; The Rust Engineering Company; Sigma Corporation; Sinclair & Valentine Co., Inc.,; Sinclair Valentine & Frye, Inc.; Twin Resco Corporation; Wheelabrator Cleanfuel Corporation; Sheelabrator Corporation of Canada, Limited; Wheelabrator Energy Systems, Inc.; Wheelabrator Financial Corporation; Wheelabrator Fuels Service Corporation; Wheelabrator International, Inc.; Wheelabrator Realty Corporation; Whiting Corporation.

---

[1] The parties in the court below were: Louis Swint and Willie Johnson, as representatives of the class of all black persons who were employed by Pullman as production or maintenance employees represented by United Steelworkers of America (USW) within one year prior to the filing of any charges under Title VII; Pullman-Standard, a Division of Pullman, Inc.; USW; USW Local 1466; International Association of Machinists and Aerospace Workers (IAM), Local Lodge No. 372.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Reasons for Granting the Writ:	
I. The Court Below Applied Wrong Legal Criteria In Determining The Bona Fides Of The Seniority System Under *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977)	20
II. The Court Below Erred In Failing To Apply A "But For" Test In Determining The Bona Fides Of The Seniority System	23
III. Did The Court Below Err In Refusing To Allow Refusals By Black Employees Of Promotions To Supervisory Positions, To Be Taken Into Account In Evaluating The Statistical Evidence, On The Assumption That Black Peer Pressure On Black Supervisors Causing Such Refusals, And Causing Poor Supervisory Performance, Was Obviously The Natural Result Of The Employer's Failure To Attain Straight Quota Promotion?	25

IV. The Court Below Erred In Holding Its "Business Necessity" Criterion Essential To Defending Against A Claim Of Discrimination Based On Promotion Statistics, To The Exclusion Of Absolute Or Relative Lack Of Qualifications, Observed Work Performance, Refusals Of Promotions, And Other Non-Discriminatory Considerations, Thereby Imposing Involuntary Promotion Quotas 28

Appendix:

Appendix A - Opinion of U.S. District Court, N.D.Ala., dated Sept. 13, 1974 ..... A-1

Appendix B - Opinion of U.S. Court of Appeals, 5th Circuit, dated Aug. 30, 1976..... A-45

Appendix C - Opinion of District Court dated July 5, 1977 ..... A-100

Appendix D - Order of District Court dated Oct. 11, 1977 ..... A-124

Appendix E - Opinion of District Court dated May 5, 1978 ..... A-128

Appendix F - Opinion of U.S. Court of Appeals dated Aug. 18, 1980 ..... A-153

Appendix G - Statutes (Title VII of Civil Rights Act of 1964 and Civil Rights Act of 1866) A-180

TABLE OF AUTHORITIES

Cases:

Electrical Workers v. Robbins & Myers, Inc., ____ U.S. ____ (1976) 17

E.E.O.C. v. Greyhound Lines, ____ F.2d ____, 24 FEP Cases 7 (3d Cir., 1980) 25

Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) ... 26

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 7,16,20,21,22,23,26,27,29

Marotta v. Usery, ____ F.2d ____, 24 FEP Cases 17 (9th Cir., 1980) 25

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n. 10 (1976) 24

Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977) 24

Williams v. Boorstin, ____ F.2d ____23 FEP Cases 669 (D.C. Cir. 1980) 25

Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (October 11, 1980) 24

Statutes & Rules:

28 U.S.C. § 1254 (1) 1

Civil Rights Act of 1964, Title VII,

§ 703 (42 U.S.C. § 2000e - 2) 1,8,26

§ 706 (42 U.S.C. § 2000e - 5 1,2

42 U.S.C. § 1981 1,2

Other Authorities:

Friedman, The Good Faith Defense in Constitutional Litigation, 5 Hofstra L.Rev. 501 (1977) 22

Sowell, Knowledge & Decisions (Basic Books, 1980) 258-59 28

Chandler, The Business Necessity Defense To Disparate -Impact Liability Under Title VII, 46 U. Chi. L. R. 911, 933 (1980) 29

OPINIONS BELOW

The opinions below are reported as follows: (1) Opinion of the United States District Court for the Northern District of Alabama on September 13, 1974, reported at 11 FEP Cases 943 and 8 EPD ¶9720 (A. 1); (2) Opinion of the United States Court of Appeals for the Fifth Circuit on August 30, 1976, reported at 539 F.2d 77, 13 FEP Cases 604, and 12 EPD ¶11,177 (A. 45); (3) Opinion of said District Court on July 5, 1977, reported at 15 FEP Cases 144 and 14 EPD ¶7815 (A. 100); (4) Opinion of said District Court on October 11, 1977, reported at 15 FEP Cases 1638 and 15 EPD ¶7993 (A. 124); (5) Opinion of said District Court on May 5, 1978, reported at 17 FEP Cases 830 and 17 EPD ¶8604 (A. 128); (6) Opinion of said Court of Appeals on August 18, 1980, reported at 624 F.2d 525 and 23 FEP Cases 748 (A. 153). Copies of these opinions are appended to this petition at the indicated page numbers.

JURISDICTION

The judgment sought to be reviewed was dated and entered on August 18, 1980. By order of November 7, 1980 this Court granted petitioner an extension of time within which to petition for certiorari, to and including January 15, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. §§2000e *et seq.*, specifically Section 703 thereof (42 U.S.C. §2000e-2) and Section 706 thereof (42 U.S.C. §2000e-5). Additionally the Civil Rights Act of 1866, 42 U.S.C. §1981. Sections 703, 706 of Title VII and Section 1981 are set forth in their entirety at A. 180-191.

STATEMENT OF THE CASE

Jurisdiction in the District Court was based on §706(f)(1) of Title VII and 42 U.S.C. §1981. The original parties defendant were petitioner, Pullman; USW; and USW Local 1466. By pretrial order the issues were limited, and further narrowed in the first appeal to the Fifth Circuit (A. 45), to the following:

> (a) That a system of departmental seniority,[2] even with changes made pursuant to a corrective action program with the Department of Labor, nevertheless perpetuates the effects of past discrimination in the assignment of black employees to generally less desirable departments.
>
> * * *
>
> (c) The Company has discriminatorily failed to promote black production and maintenance employees to supervisory and managerial positions.

The complaint was amended on the first day of trial to add Local Lodge 372, IAM, as a defendant, but only for the limited purpose of enabling the Court to order appropriate changes in its union contract with Pullman.

In the first 16-day trial the evidence showed:

The Pullman plant at Bessemer, Alabama, is the world's largest freight car building plant. It manufactures many types of railroad cars. Not only are there frequent and large fluctuations in the size of the work force at Bessemer, but also as each new car order goes into production, there are large manpower fluctuations in Pullman's 27 departments which peak at quite dif-

---

[2]The "system of departmental seniority" referred to is the system established by Pullman's contract with the United Steelworkers. The undisputed evidence shows that the contracts between Pullman and IAM Local Lodge 372 have always since 1944 provided for accrual and application of seniority by job classifications.

ferent times. From the late 40's until June, 1965 a number of the better jobs were de facto occupied only by whites, although earlier than that, back to the time the plant was built in 1929, a good many of these were racially mixed. In March, 1965, the USW obtained a labor arbitration award ordering the Company to give performance tests in riveting to blacks, the riveters classification being at that time all-white. Immediately the Company took steps throughout the plant to open up any de facto barriers to negro advancement to the highest paid departmental jobs. The result in all 18 racially well mixed departments was to eliminate in fairly short order, the effects of alleged past discrimination, for as soon as a black Helper became qualified, if he was senior to a white Operator, the next time there was a layoff and recall, the black got first preference for an operator vacancy.

Over a period of several years beginning in 1968 Pullman negotiated with the Office of Federal Contract Compliance (OFCC) terms of a Corrective Action Program and implemented them as tentative agreements were reached. All departments were substantially integrated in June, 1965, except five were all white, three were all black and the Steel Miscellaneous Department had two whites and 86 blacks. The OFCC agreement provided that the black incumbents of these substantially all-black departments would be entitled to special transfer rights to any department in either bargaining unit with carryover of plant seniority and retreat rights; further that *all* Negroes employed prior to April 30, 1965 (a date selected as the date after which no affirmatively discriminatory practices or system persisted) were granted the same preferential transfer rights to the all-white departments. The OFCC agreement, which is of unlimited duration, contained many other affirmative action provisions favoring blacks, all administered by two salaried Contract Compliance Officers, one black and one white.

Pullman presented a variety of statistical studies which indicate, along with other proof, that its seniority system and the OFCC Agreement have in fact not perpetuated any wrongs or retarded black progress but that blacks have rapidly advanced in accordance with the rightful place principle. The actual percentage of black employees at Bessemer is significantly higher than in the relevant labor market; random distribution therefrom would result in a work force about one-third black, while the observed frequency is around 50%. In the last year before the first trial for which such data was available, 1973, the mean annual earnings of black employees, including Unemployment and Supplemental Unemployment Benefits was *98.5%* the average for all employees. Calculation of mean annual earnings for 1970 through 1973; showed the black percent of the mean was 94, 96, 96.1 and 98% respectively. It is clear that there has been a gradual and consistent improvement in the prosperity of black employees.[3] The District Judge's independent analysis of the data showed that 40% of the blacks and only 36% of the whites were in the upper half of departments ranked according to departmental disirability.[4]

---

[3]The Fifth Circuit in the 1976 appeal held (A. 71) that these statistics were *irrelevant* and that it was improper to consider them, because they did not reflect differences in seniority and time worked.

[4]The Fifth Circuit's 1976 opinion held that "departmental desirability" was not relevant to whether there had been racially discriminatory departmental seniority system (A. 59, 64) except that it would be relevant to prove, but not to disprove discrimination. The opinion further said evidence of economic harm was irrelevant to the question of discrimination unless it favored plaintiffs' case, and also irrelevant to an award of back pay unless defendants first carried a burden of "convincingly [bringing] into question the class' entitlement to it." The Fifth Circuit's 1980 opinion again said (A. 165-66) that although evidence of economic desirability cannot help the defendant, it may be considered to the extent it favors the plaintiffs.

The evidence at the first trial showed with regard to supervisor promotions:

As found by the trial court, between mid-1965 and the time of the trial, 56 blacks, approximately one-third of the total number, were appointed as hourly foremen, and considering the higher incidence of functional illiteracy among black employees, and of refusals by blacks of such promotions, this does not support a claim of discrimination since 1965. Promotions to salaried foremen, approximately 20% of those since mid-1965, were also found not disproportionate considering such factors. The District Court further found:

> "There are many reasons why an employee, white or black, might choose to reject a temporary promotion to foreman; but it is clear from the evidence that an additional problem for blacks considering acceptance of such positions . . . was the likelihood of derision as an 'Uncle Tom' by some black co-workers."[3] (A. 25)

The District Court's finding has never been questioned that:

> "The evidence has not shown a single example of a black indicating an interest in a foreman's job being passed over in favor of a white with less qualifications." (A. 25)

The District Court's first opinion,—

> "found Pullman's departmental seniority system not to be in violation of Title VII, basing its decision in large part

---

[3]There was a great deal of evidence, all uncontradicted, of massive peer pressure by a small segment of blacks on other blacks to discourage them from accepting foremen positions, to discourage them from doing a responsible job of maintaining order and discipline, once made an hourly foreman, and to intimidate them into giving it up after accepting the job. A vocal minority of the black employees engaged in concerted name-calling, abusive language, uncooperativeness, even a radio broadcast to harass and intimidate black supervisors.

> upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignment to most of the departments. . . . While finding that there had been discrimination in assignments to nine [of 27] departments, the trial court concluded that, in view of the transfer opportunities given blacks in 1972, the effects thereof were not being perpetuated." (A. 103)

The Court of Appeals has never addressed itself to the finding that there never was discrimination in assignments to two-thirds of the departments, which included all the large ones.

On the first appeal, the Fifth Circuit did not reverse anything, but with respect only to the seniority and foreman issues "vacated and remanded." It found it was "error to require plaintiffs to prove economic harm as an element of their prima facie case of racially discriminatory departmental assignment" (*sic; scil.* departmental seniority system). But it did not find the error was prejudicial, for it said with respect to this issue:

> "It would be inappropriate for this court to decide here whether a prima facie showing was made. . . . This evidence-weighing process should be conducted by the district court in the first instance, *especially since the question is so obviously a close one.*"[6] (A. 65)

No explanation was given of how the question of *disparate impact* can be prescinded from an economic comparison. With respect to foreman promotions, the Fifth Circuit on the first appeal held that greater frequency of functional illiteracy among black employees and their lower skill levels in some jobs cannot

---

[6] On much the same evidence, the Fifth Circuit panel on the second appeal said it had "a definite and firm conviction that a mistake has been made," made many findings contrary to those of the District Court and rendered final judgment on all issues, remanding only for a remedial order. (A. 170, 171).

lawfully be considered in evaluating the observed data on supervisory promotions; illiteracy was held to be an impermissible factor unless Pullman adopts a *minimum education requirement,*[7] and either validates this or proves it is a business necessity "under the strict guidelines of Title VII" [*sic*]; also that relative lack of skill is an impermissible factor unless "the needed skills are justified by a business necessity".

After remand, the evidence at the second trial showed: (1) Of the total of 447 white welders hired between June 1, 1963 and May 31, 1965, at least 435, or 97.3% had prior formal training or experience as a welder. (2) Of the 49 Electricians in Pullman's employ on June 1, 1965, or during the preceding year, at least 46 had prior electrical experience or formal training. (3) Of the 37 Pipefitters employed by Pullman on June 1, 1965, or during the preceding year, at least 32 had prior formal training or experience. (4) On June 1, 1965, blacks held 57% of the jobs in the Maintenance-CIO department other than electrician or pipefitter. (5) Of the 1,151 black employees on the seniority roster on June 1, 1965, 1,148 had no prior training or experience as welder, electrician or pipefitter. One had prior pipefitting experience; two had prior welding experience. Between trials, 394 promotions of blacks to temporary foreman had been made, or 31.1 of the total of 1,265. One third of the 12 new salaried foreman were black.

Following the second trial, and before a decision was announced by the District Court, this Court decided *Teamsters,* 431 U.S. 324 (May 13, 1977) and *United Air Lines,* 431 U.S. 553 (May 31, 1977). The District Court's second opinion, pointing out that *Teamsters* had discredited the "perpetuation of past discrimination" test of seniority system validity; explicitly found that the seniority system was adopted and maintained free of racial purposes; that it is neutral in form, consistent with industry practice, and particularly for a company with

---

[7] No reason was given for this strange proposition. (A. 81).

Pullman's operational characteristics, quite rational; and that it has been uniformly applied. The Court qualified this with a finding that under the OFCC Corrective Action Program, Pullman agreed to changes in the seniority system "which are purposefully discriminatory — in favor of affected blacks — and, which are not neutral at all" and that the system as modified does not discriminate against blacks and is valid under §703(h). The court found:

> "that the somewhat disparate compositions of the departments in the post-1966 period were attributable to the assignments made prior to Title VII. ...
>
> "... These statistics give rise to no inference that assignments were being made to further a policy of segregated or racially imbalanced departments. Indeed, if anything the reverse is true: the post-1966 assignments indicate that the company was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white or predominantly-white ones.'" (A. 106)

The district court said that one method of statistical proof approved in *Teamsters* is to compare racial composition of departments with census information (A. 105)[8]; that although

---

[8] The Fifth Circuit gave no consideration to this finding or to the statistics supporting it; but made specific reference only to assignments to the two IAM Departments (A. 162-63) as somehow tainting the whole USW seniority system of which they are not even a part, and even though training or experience is particularly a legitimate consideration in hiring machinists and millwrights.

[9] The Fifth Circuit made no comparison of its data on assignments to the two IAM Departments to census information. While those data include 1965, a period clearly prior to any conceivable period of limitations, even assuming their correctness and relevance, had such comparison been made, it would not support an inference of discrimination. See pp. 17-18 below.

> "In Teamsters, the statistical data gave rise to an inference of discrimination, a conclusion 'bolstered' by evidence of specific employment practices; here, the statistics for the period in issue give rise to the contrary inference, a conclusion abundantly supported by the other evidence in the case." (A. 106)

Not only was there no statistical basis for upsetting this finding; there was not a single instance shown of a black applicant who was qualified for any job during the period of limitations who was not hired for it.

The district court found that there were no assignments to departments which discriminated against blacks in the limitations period. There was no evidence to the contrary. Even the two departments the Fifth Circuit isolated as worst case statistics would not sustain any inference to the contrary, and when all 27 departments instead of only two are taken into account, the statistical case is further shown to be non-existent.

As for supervisory promotions, the district court compared the racial distribution of salaried supervisors to the "group . . . which, when special qualifications are needed to fill particular jobs, possesses those qualifications." Finding that it was clear from the evidence if not from common sense that special skills are needed by supervisors, the District Court reasoned that it was *appropriate to a statistical analysis* to consider temporary foreman promotions department-by-department. The evidence and the District Court's own findings showed that Pullman did not restrict promotions to temporary foreman to intradepartmental ones.[10] (A. 113)

---

[10] The Fifth Circuit, however, seized on the trial court's use of Title VII jargon in justification of a statistical method, to condemn Pullman as if it had imposed a "facially neutral test with disparate impact" on promotions to temporary foreman, which it never imposed and which undisputed evidence shows was never a requisite to such promotions.

The District Court found on ample evidence:

> "When both the statistical data, fairly evaluated, and the non-statistical evidence are fairly considered, the court is convinced, and so finds, that the plaintiffs' *prima facie* showing of discrimination in promotion of temporary foremen in the Welding Department has been rebutted and that no such discriminatory practice existed subsequent to 1966. The same finding is made with respect to promotion of temporary foremen in the other departments." (A. 117)

The District Court's statistical demonstration, by the use of standard deviation analysis, that Pullman did not discriminate in promotions to foreman, is quite unremarkable.

The District Court therefore concluded after its second trial that no law had been violated (A. 117). Thereafter, the District Court granted plaintiffs' motion to reopen the record upon the issue of the validity of the seniority system under Section 703(h)" (A. 126) after which the following evidence was introduced:

On August 1, 1941, the Steel Workers Organizing Committee (SWOC) filed with the NLRB a petition seeking to represent a unit of all Pullman's production and maintenance employees. Thereafter the IAM intervened seeking to represent a unit composed of:

> "all machinists, apprentices and helpers in the maintenance and other departments where they work,

---

The Fifth Circuit then said there was no "evidence sufficient to show that the *limitation* upon which *the defendant's business necessity defense rests* is essential to the safety and efficiency . . .", so Pullman is guilty. In short, the evidence showed no promotion criterion existed; it was only a criterion for analyzing statistics. But the result of this semantic maze of Newspeak was that sight was lost completely of that fact.

> namely, the wheel and axle shop, the machine shop, the tool and die shop, and the welders, and the air brake department."

At the NLRB hearing the IAM representative stated that he sought a unit consisting of everyone that he could represent under the union constitution, specifically including Negroes. The IBEW also intervened seeking to represent an electrical craft unit. Pullman stated it took no position with respect to the appropriateness of the units requested. The NLRB found that all the employees sought to be represented by the IBEW or IAM "appear to come under their craft jurisdictions"; and that any of the units sought could be an "appropriate unit".[11]

Following the NLRB election on October 7, 1941, IAM, IBEW, and SWOC were certified for the three units, the two craft units and the residual production and maintenance unit[12] respectively.

---

[11] The Fifth Circuit said:

> "The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units." (A. 170)

It is submitted that the Fifth Circuit cannot on the basis of *credibility*, reject the defendants' explanation that their bargaining was conducted according to NLRB certifications.

[12] The Fifth Circuit incorrectly asserts as a fact "the creation of the various all-white and all-black departments *within the USW unit* at the time of certification. ..." (A. 171) for the evidence is positive and uncontradicted, that these departments within the USW unit certainly existed prior to any certification. Likewise there was no basis for the Fifth Circuit's finding that the USW "succeed[ed] in significantly segregating the departments within its own unit".

The first contract between Pullman and the SWOC was negotiated with a union committee consisting of two blacks and two whites. At all times since, USW local union officers have been about half white and half black. The first USW contract contained a departmental seniority provision proposed by this biracial committee. Some time late in 1941 the IAM and SWOC became aware of minor errors in the description of the IAM bargaining unit in its certification, certain non-craft classifications being included which the IAM had not petitioned for, and two departments being erroneously named as one. The two unions sought NLRB help in correcting these, which resulted in an agreement between them approved by the Board. Contrary to the statement of the Fifth Circuit (A. 170) the IAM unit was not all white following this 1941 clarification. After that date, for example, some or all of the IAM welder helpers, specifically included in the IAM unit by the 1941 clarification, were black, and this remained true at least until 1944. On May 25, 1944 the USW filed a petition seeking representation of all the IAM employees. This representation question was settled in an informal settlement conference held by the NLRB hearing officer among the USW, IAM and Pullman. The subject of the conference was whether the USW would be willing to settle for part of the IAM unit, and leave the rest for IAM. Herring, a USW spokesman at the meeting, testified that he told the IAM "we are going to take who we want, and not who you want to give us." Pullman had been having numerous strikes and certain members of the IAM had been crossing USW picket lines. Herring said he told the IAM that the USW would take everyone but the machine shop and the millwrights and that the USW did not "want them scabbing son-of-a-Bitches, they come across our picket line." The two unions then agreed to a compromise, which was approved by the NLRB and reduced to writing on June 14, 1944 which left the IAM only those employees who had crossed USW picket lines; that is, the machine shop employees in Die and Tool and the Millwrights in Maintenance, transferr-

ing all to the USW unit.[13] The IAM unit lost approximately 100 employees to the USW and retained about 50. Possibly as many as 20 of the 100 lost were black and it is certain that Mose Johnson and Early Bell at least were black IAM welder helpers transferred to the USW unit at the time. Pullman was entirely passive in the matter. No one lost any seniority or promotional advantage and two split departments were put back together again in the USW unit. When the IAM agreement was amended on October 6, 1944, job classification seniority was adopted with respect to layoffs and recalls.

A basic change in the seniority clause was negotiated in the 1947 USW contract in that it provided for *occupational* seniority as Dickerson, a black committeeman, had proposed. From 1947 to 1954, while the regime of occupational seniority groupings continued, the seniority lists show several changes of departmental names and one or two nominal mergers and schisms which had no effect on anyone's seniority status since it was at that time on an occupational basis. In the first half of 1952, anticipating a demand by USW for Company-wide negotiations, Pullman undertook a "comprehensive study" comparing its union contracts at various plants. At the time Pullman operated three car or car repair plants other than Bessemer.[14] In 1954 company-wide bargaining was instituted

---

[13] Viz., all welding, wheel & axle, air brake, and steel erection tool room employees. The district court found with ample support that the USW's "concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because it viewed them as scabs. ..." (A. 145)

[14] The Butler, Pennsylvania plant is a car plant, not quite as large as Bessemer; its output is limited almost exclusively to hopper cars. It has always had a departmental seniority system and departments quite similar to those at Bessemer since 1954, without the OFCC agreement

with the USW which resulted in return to a departmental seniority system at Bessemer. The department setup reverted almost exactly to what it was before the change to occupational seniority.[15]

The Fifth Circuit held that a discriminatory purpose of the seniority system ought to be inferred from the changes in USW departments, all before September 1, 1954. But the combining and separation back of Janitors and Plant Protection on the seniority lists both occurred at a time when seniority was by job

---

modifications. In 1965 its work force consisted of 2531 white and 16 black employees, or .6% black. According to the 1954 study, there were no basic problems in its departmental seniority system. The Hammond, Indiana plant does not produce cars, but makes box car doors and components of cars and makes car repairs. It has always had departmental seniority. In 1954, there were no problems with the departmental seniority system in management's view. On December 3, 1965, the Hammond work force of 470 was 87% white, 11.7% black, 1.1% Spanish surnamed Americans, and less than .1% American Indian. The Worcester, Massachusetts, plant was a car building plant with a plant wide seniority system. As a result, according to the study, it also had an excessive number of seniority grievances. *Every time* a vacancy was filled on the basis of relative ability, grievances were filed. The Worcester plant has since been permanently closed for economic reasons, substantially contributed to by the plant-wide seniority procedure (A. 136)

[15]The only exceptions were: (1) The Boiler House was established as a new department. There were only three bargaining unit employees in that new department on September 1, 1954 and it has been entirely vacant since June 22, 1964. If there were any discriminatory motive, any arguable adverse effect thereof on blacks ceased prior to Title VII. (2) It was also agreed to merge the Paint and Shipping Track Departments effective September 1, 1954. This resulted in a department consisting of 59 black and 44 white employees, instead of two departments composed respectively of 53 black and 36 white, and 6 black and 8 white employees. (3) The Inspection Department continued to exist.

classifications so that neither was a change in seniority units; the only new seniority unit was the Inspection Department, which was created, dissolved and recreated during the job classification seniority era and had an obvious rational basis; and the merger of Paint and Shipping Track Departments resulting in greater integration and racial balance which makes it clear that factors other than race were determinative.

The seniority system in the IAM unit since 1944 has been based on length of continuous service *within job classifications.* If breadth of seniority groupings were a product of discrimination against Negroes, one would expect broader seniority groupings in the IAM unit than in the USW, yet the contrary is true.

The seniority system at Pullman's Butler plant, where blacks have always constituted a very small portion of the work force, has always been a departmental system similar to that which the Bessemer USW unit had prior to the OFCC agreements in 1972. If racial discrimination really had anything to do with adoption of departmental seniority, it is inexplicable that departmental seniority was always in effect in Butler.

Following this trial, the District Court again found in favor of the defendants. It found the departmental seniority system to be facially neutral in the same way the system in *Teamsters* was; that the seniority units constituted as a whole a rational structure,[16] in accord with the industry practice, and consistent with NLRB policies. As for "genesis" of the seniority system, the District Court found as to Pullman's role:

---

[16]The Court found that, given the economic conditions under which this plant must operate, "the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumping or displacements, highly inefficient performance, or excessive grievances over ability factors, or all of them." (A. 136) The Fifth Circuit evidently ignored these findings and the abundant supporting evidence, and found:

> "The effort of the plaintiff to fix responsibility on the company for whatever racial discrimination may have existed in the IAM is likewise without merit. The Company properly took a 'hands-off' approach toward the establishment of the election units. It bargained with those unions which were afforded representational status by the NLRB, and did so without any discriminatory animus." (A. 146)

The Fifth Circuit did not address itself to the question of how Pullman could be liable for the alleged "motives and intent of the IAM in 1941, and 1942." It said the USW "acquiesced in the discrimination" (A. 170) and added the erroneous finding, "while significantly segregating the departments within its own unit." Nor did it address itself to the fact that the USW negotiated its own departmental seniority system independently of the IAM.

The Fifth Circuit avoided such difficulties by calling the District Court's reasoning "blemished", declaring that IAM's alleged motives in 1941-44 somehow requires both seniority systems to be lumped into one and makes both *mala fide*."

> "The establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races. . . . No credible explanation has been advanced to sufficiently justify the separate seniority units." (A. 167, 170)

In effect the Fifth Circuit refused to believe the evidence.

"The *Teamsters* case was finessed by lavish use of hyperbole: "It is crystal clear that considerations of race permeated the negotiation and adoption of the seniority system in 1941 and subsequent negotiations thereafter." (A. 169) This despite the undeniable fact that the certification of the IAM bargaining unit and clarification thereof, to which the evil "genesis" was primarily attributed, preceded any negotiation, any contract, and any seniority system; and despite the fact that blacks and whites were always approximately equally represented in USW contract negotiations.

The District Court also found that departmental seniority was the most probable type of seniority system USW and Pullman would have adopted irrespective of racial considerations:

> "Indeed, as the company has established—by publications of the Department of Labor, various collective bargaining agreements, and contemporanious studies made by it at the time of contract negotiations—seniority by departmental age such as found at Bessemer was the modal form of agreements generally, well as the manufacturers of railroad equipment in particular." (A. 143)

This finding implies and would justify the conclusion that Pullman and USW would have reached agreement on a departmental system in the absence of any racial considerations.

The Fifth Circuit treated as though it was a separate issue, whether there were racially discriminatory assignments to departments within the relevant time period and concluded that there had been.[18] The only specific assignment data considered in its opinion were for the two IAM departments, Die & Tool and Maintenance-IAM; the opinion states as to the former:

> "Our review of the evidence indicates that between 1965 and 1970, the company made approximately thirty-six new assignments to this department, all white persons. The first black was assigned to the department in 1970. In 1971, seven whites were assigned to the department along with two more blacks." (A. 162)

---

[18]The Fifth Circuit's opinion does not address itself to the question of the proper period of limitations. The District Court gave plaintiffs the benefit of the doubt and used the earliest possible date, September 28, 1966, although expressing substantial reservations that such a date is proper. Under *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976), February 10, 1970 appears to be the correct. In its deliberations the Fifth Circuit gave weight to data in 1965 and all of 1966. We will cite in this petition assignment data for 1965-70 although much of it is time-barred.

The Fifth Circuit says these statistics were obtained from "seniority lists for the years 1965 to 1973." The District Court had come up with other figures. In actual fact the record shows as to Die & Tool-IAM, the following newly assigned employe by classification, and race:

Time Period	Machinist	Machinist Apprentice	Tool Rm Man	Crane-Man	Die man	Tool Grinder	Clean-up man
1965	12(W)	2(W)	2(W)	2(W)	2(W)	2(W)	
1966(3 qrs.)	7(W)		1(W)		3(W)		
1966(4th qr.)	5(W)	1(W)					1(B)
1967	7(W)						
1968							
1969	1(W)						
1970		2(B)					

There is no way to count 36 white assignments, either for 1965-1970 inclusively, exclusively, or in any combination of years. If one takes the data beginning with the earliest possible limitations date (September 28, 1966), through the year 1970, there were 14 whites and three blacks newly assigned to Die & Tool-I.A.M. All but one of the whites were machinists. From available 1970 census data[19] the expected number of black machinists if 13 were hired at random from those in Alabama would be 502/6291 times 13, or in round numbers 1. The standard deviation would be calculated as $\sqrt{(.08)(.92)(13)}$ or 1. The difference between expected (1) and observed (0) would be one

[19] The 1970 census shows that in the State of Alabama there were 5,789 white and 502 Negro "Machinists"; and 25,248 white and 2,215 Negro "Mechanics and Repairmen, except Auto", the census category most nearly corresponding to Millwrights, who make up the IAM Maintenance Department.

standard deviation, well within the two or three exceeding which could give rise to an inference of discrimination. This is confirmed by undisputed testimony that Pullman was making strenuous efforts to find black machinists and could not. As for the remaining classifications, hiring at a ratio of 3 blacks to 1 white could not show discrimination against blacks. The Fifth Circuit reached an erroneous conclusion through clearly improper use of statistics.

As for the Maintenance-IAM Department, the Fifth Circuit said

> "the company assigned seven new employees to this department between 1967 and 1970, all of whom were white. The first blacks were assigned to the department in 1970 when six blacks were assigned to the department along with four whites."

The seniority lists for 1967-70 inclusive show all new hires in that period were junior millwrights as follows:

1967 - 1st quarter - None

1967 - 2d quarter - 10(W)

1967 - 3d qr. through 1st qr. 1970 - inclusive — None

1970 - 2d quarter-4(W), 3(B)

1970 - 3d quarter-3(B)

1970 - 4th quarter-None

Thus the Fifth Circuit counted a higher than actual ratio of black hires. The totals for the period are 14 white, six black. If you take the percentage of black "mechanics and repairmen, other than auto" in Alabama according to the 1970 census, or 8%, it could well be concluded that Pullman was engaging in reverse discrimination.

The Fifth Circuit inexplicably erred in counting (as apparently the District Court did also), but the "worst case" examples picked by it, simply do not sustain any statistical inference that Pullman discriminated against blacks in assignments to the IAM departments, much less the 25 USW departments, where reverse discrimination was very much in progress.

REASONS FOR GRANTING THE WRIT

I

The Court Below Applied Wrong Legal Criteria In Determining The Bona Fides Of The Seniority System Under *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). —

The *Teamsters* case involved a motor carrier which had 51 terminals and 124 separate Teamsters contracts. At various terminals there were separate over-the-road, city, garage, and clerical bargaining units, each having separate seniority. The road drivers, at all terminals, both before 1965 and until the time of suit, were all white, with one individual exception at the Chicago terminal. All minority drivers were placed into city jobs. This Court held "that the Government had proved a prima facie case of systematic and purposeful employment discrimination, continuing well beyond the effective date of Title VII" and until the time of trial; that this Post-Act discrimination within the statute of limitations could properly be remedied by full make-whole relief, including retroactive seniority, without attacking the seniority system. Also there was proof of "over 40 specific instances of discrimination." Nevertheless the bona fides of the seniority system was sustained; the basic holding was "that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."

Except in one particular, discussed in the next paragraph, there was no evidence in this case qualitatively different from

that in *Teamsters*, and it was markedly less quantitatively. Instead of over 40, there was not one instance shown of a particular black employee having been discriminated against at any time; instead of some 50 or 51 all white road driver units, and a comparable number of racially mixed city driver units, Pullman had five white seniority groups, four which were all or substantially all black, and 18, including all the large ones, which were racially mixed. Instead of discrimination in hiring road drivers continuing up until the time suit was brought, the evidence here showed reverse discrimination favoring hiring of blacks in the previously white department and whites in the previously black departments, commencing before any statute of limitations applicable to this suit; the "worst case" statistics cited by the Fifth Circuit for the two IAM Departments, upon application of statistical principles approved by this Court, do not sustain any inference of discrimination even for the isolated area and period of time selected by the Fifth Circuit to sustain the substitution of its factual findings for those of the District Court.[20]

The one fact that differs from *Teamsters* in a direction arguably adverse to defendants herein, is the NLRB certification in 1941 of IAM Local 372, for a craft unit found by the NLRB to be craftsmen and their apprentices and helpers; and subsequent shrinking of that unit (again with NLRB certification) to comprise only millwirghts in the Maintenance Department, and machinists, and a few related craft classifications and helpers in IAM-Die & Tool. The existence of the Board-certified IAM unit since 1944 is somehow held to negative the bona fides of the departmental seniority system agreed to between Pullman and USW quite causally unrelated to the existence of the IAM unit.

---

[20] The Fifth Circuit made no effort to compare the observed data with the ethnic composition of qualified machinists and millwrights and other skilled workers in the labor market.

In short, the Fifth Circuit has applied *Teamsters* in such a way as to invalidate a seniority system, substantially on the circumstance that Pullman and USW bargained for a unit certified by the NLRB since 1944. All other evidentiary factors were equally or more favorable to defendants than corresponding factors dealt with in *Teamsters*.

Pullman earnestly submits that whatever the state of mind of members of the IAM was in 1941 and 1944, its compliance and the USW's compliance with facially valid orders of the NLRB for over 25 years cannot properly be the basis of an inference of bad faith in the departmental seniority system arrived at by them acting quite independently of IAM; and that the *Teamsters* case is therefore controlling authority that their seniority system was bona fide. Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 Hofstra L.Rev. 501 (1977).

The writ should be granted because the Fifth Circuit should not create an exception to *Teamsters* based on actions of Pullman and USW in obedience to the order, valid on its face, of a duly constituted agency of the United States, made 35 years ago. They had no real choice of what unit they would bargain for.[21] An important question is presented as to whether the validity of decades-old NLRB certifications is subject to collateral attack in this manner, particularly where IAM Local 372 was made a party to this action solely to the extent of subjecting Local 372's contract — not its certification nor its existence as a labor organization — to possible modification.

The obvious fortuity or lack of causal relation between the certification of separate units, and the reaching of an agreement between Pullman and USW on departmental seniority within its

---

[21] (except the choice made by the Steelworkers in 1944 to leave the "scabs" in the IAM unit and to take the rest who included blacks and whites, into its unit, a choice which was clearly not invidiously racial).

unit, suggests that the Fifth Circuit continues to adhere to its earlier position in *Teamsters*, reversed by this Court, and that the instant holding is invalidation of a seniority system under the perpetuation of past discrimination formula in scarcely altered guise; that now it is discrimination "in the air" in the 40's and alleged invidious motives of the IAM in that era, that serve to condemn the agreement of Pullman and the USW.[22] The importance of these questions to the proper application of *Teamsters* justifies granting the writ.

II.

The Court Below Erred In Failing To Apply A "But For" Test In Determining The Bona Fides Of The Seniority System. —

The undisputed evidence showed, and the District Court found, that the modal form of seniority system in heavy American industry was in the 40's and still is departmental. A majority of such systems provide for departmental or smaller size seniority units. This is even more markedly true of the transportation equipment industry of which the Bessemer plant is a part. Furthermore, in addition to the fact that departmental seniority systems are typical of car-building plants of competing companies in widely separated parts of the country, Pullman has departmental seniority systems at both its Hammond car components plant, and at its Butler carbuilding plant.

The District Court's valid findings imply ineluctably that USW and Pullman would not have bargained for a plant-wide (or bargaining unit-wide) system had the racial composition and mores of the Bessemer plant, been different. In short, the record shows that Pullman and USW would have agreed on a

---

[22] The disregard for the trial court's findings by the Fifth Circuit and substitution of its own unsupported firm this conclusions contravenes Rule 52(a). Although the Fifth Circuit states at A. 170 that Rule 52(a) does not apply to findings made "under an erroneous view of the law", no erroneous view of the law by the District Court has ever been identified by the Fifth Circuit.

departmental system anyway, just as they did at Butler in Company-wide bargaining. The record therefore presents an important question of first instance under Title VII: Can a seniority system be held not bona fide under §706(h) if it would have been adopted anyway, that is, even absent any racial factor? The Fifth Circuit gave no consideration to this question, but held the motivation of IAM in securing certification of a separate craft unit, which eventually shrank to an all white bargaining unit, plus a diluted version of the sort of evidence in *Teamsters, supra,* required reversal as a matter of law of the District Court's conclusion that the seniority system was bona fide.

In dealing with plural causation of employer action, in *Mt. Healthy Board of Education* v. *Doyle,* 429 U.S. 274 (1977), this Court held that even if a public employee's exercise of First Amendment rights played a "substantial part" in a public employer's decision not to renew his employment, that would not necessarily be wrongful:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a . . . 'motivating factor' in the Board's decision not to rehire him. Respondent having carried this burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 287.[21]

---

[21]This Court held in a Title VII discharge case, *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 282, n.10 (1976), that in such case it must be shown that "race was a 'but for' cause." The NLRB also recently adopted the *Mt. Healthy* standard *Wright Line, Inc.,* 251 NLRB No. 150, 105 LRRM 1169 (October 11, 1980).

This record squarely presents, the question whether the but for test of causation must not be applied to determine the bona fides of a seniority system, where there is substantial evidence, as here, that a departmental seniority system would have been adopted for purposes of maximizing efficiency and in accordance with industry practice and generally believed principles of industrial management, even if there had been no racial aspect involved. This is an important question in the administration of Title VII which was overlooked or ignored by the Court below, and which is certain to recur in many contexts.[24] The writ of certiorari should be granted so that this Court may authoritatively decide this question.

III.

Did The Court Below Err In Refusing To Allow Refusals By Black Employees Of Promotions To Supervisory Positions, To Be Taken Into Account In Evaluating The Statistical Evidence, On The Assumption That Black Peer Pressure On Black Supervisors Causing Such Refusals, And Causing Poor Supervisory Performance, Was Obviously The Natural Result Of The Employer's Failure To Attain Straight Quota Promotion? —

In the last analysis the Court of Appeals relied on statistics to find Pullman discriminated against blacks in promotions to foreman, but refused to give statistical consideration to black refusals of such promotions:

> "The circumstances [i.e., black harassment of black supervisors, leading to absence of displaying good supervisory qualities and black refusals of promotions] *undeniably [sic]* emanate from the very discrimination

---

[24]The current controversy in this area is illustrated by *EEOC* v. *Greyhound Lines*, ____ F.2d ____, 24 FEP Cases 7 (3d Cir., 1980); *Williams* v. *Boorstin*, ____ F.2d ____, 23 FEP Cases 669 (D.C. Cir. 1980); and *Marotta* v. *Usery*, ____ F.2d ____, 24 FEP Cases 17 (9th Cir., 1980).

> which the class members seek to eliminate. When *insufficient*[25] *initiatives* which purport *to rectify a personnel imbalance [sic]*[26] follow a history of preserving certain personnel positions for a select group based upon race, such peer pressure naturally and *conveniently* results therefrom. . . . We hold, therefore, that the defendants [sic] failed to rebut the plaintiffs' prima facie case of racial discrimination in the selection of supervisory personnel." [Emphasis added] (A. 176)

This passage asserts that if the employer doesn't meet his quota of black supervisors, it is no excuse that they won't be good supervisors or that they refuse the promotions. Apart from the problems of imposing quotas under Title VII, doing away with poor job performance and refusals as articulated explanations, and reconciling mandatory quotas despite such refusals with the XIII Amendment, this passage is a 180° reversal of the Fifth Circuit's holding in its 1976 decision in this case:

---

[25]Compare *Teamsters* v. *United States*, 431 U.S. 324 at 339, n.20:

> " . . . §703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.
>
> ". . . It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."

[26]Compare Civil Rights Act §703(j) and *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577-79 (1978):

> "To prove that [he based his employment decision on a legitimate consideration,. and not an illegitimate one such as race, an employer] need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII prohibits him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."

> "The court found that 30 blacks and 17 whites have turned down hourly foremen opportunities since the mid-1960's. *This, of course, is a legitimate item of rebuttal to a prima facie case.* (Emphasis added.) (A. 81)

But what is perhaps a more serious problem with this reasoning is its patently ideological character: that black refusals *"undeniably* emanate" from discrimination and therefore furnish no legitimate explanation for not attaining statistical proportionality. Why can't this be denied? There was no *evidence* that black name-calling and other insolent treatment of black supervisors was causally related to employer mistreatment of blacks in any form.[27]

Even if it were true that this peer abuse was the result of employer discrimination, it would furnish no basis for requiring Pullman to fill foreman vacancies with the unqualified or less qualified,[28] nor of requiring involuntary servitude of blacks as supervisors.

---

[27]It was only a vocal minority of blacks who engaged in this anti-progress peer pressure, which is hard to reconcile with the hypothesis that employer discrimination is what caused it. Furthermore, their leading spokesman, Louis Swint, gave an explanation in a radio broadcast for this antipathy toward black supervisors which is totally contrary to the Fifth Circuit's revealed wisdom. In it, Swint declared that anybody the white man puts in charge, "you can bet he's a Uncle Tom, because that man is not going to put anybody in there that's for the welfare of the working man . . . *It is not a question here of black versus white — it is a question of labor versus management.*"

[28]*Teamsters* v. *United States*, 431 U.S. 324, 358 (1977):

> ". . . the two most common legitimate reasons on which an employer might rely to reject a job applicant [are] an *absolute or relative lack of qualifications* or the absence of a vacancy in the job sought." [Emphasis added.]

It is noteworthy that the legitimacy of this reason is not conditioned upon whether or not the relative lack of qualifications is itself the result of some past discrimination.

The trouble with this substitution of ideology for fact is superbly expressed by the noted black economist, Thomas Sowell, in "Knowledge & Decisions" (Basic Books, 1980) 258-59:

> "The point is that both causal determination and policy prescription require coherent analysis, rather than gut feelings garnished with numbers. Many of the hypotheses behind 'affirmative action' are not unreasonable as hypotheses. What is unreasonable is turning hypotheses into axioms. The preference for intentional variables ('discrimination') has virtually excluded systemic variables (age, location, culture) from even being considered. . . . The general unattainability of many quotas means that [affirmative action] penalties fall equally on discriminatory employers and non-discriminatory employers . . . Moreover, the ease with which a discrimination case can be made makes minorities and women more dangerous employees to have. . . ."

We submit that certiorari should be granted to review and correct this process whereby ideology may supplant fact and law in the administration of Title VII.

IV.

The Court Below Erred In Holding Its "Business Necessity" Criterion Essential To Defending Against A Claim Of Discrimination Based On Promotion Statistics, To The Exclusion Of Absolute Or Relative Lack Of Qualifications, Observed Work Performance, Refusals Of Promotions, And Other Non-Discriminatory Considerations, Thereby Imposing Involuntary Promotion Quotas. —

Although Pullman clearly imposed no requirement that a foreman be promoted from within the same department, and 3% of such promotions were not from within the same department the Fifth Circuit apparently misunderstood that it did,

reaching this misconception from the District Court's explanation of its statistical methodology in connection with supervisory promotions. The Fifth Circuit then held that Pullman discriminated against blacks in promotions to foremen (it made *no* difference that more blacks than whites refused such promotions) because the imaginary requirement that supervisors be promoted from within the same department was not a "business necessity."

The phrase "business necessity" was coined by this Court in the *Griggs* case, 401 U.S. 424 at 431 (1971) in connection with intelligence tests which had a disparate impact; *Teamsters* 431 U.S. 324 at 335, n.15 says "business necessity" is part of the formula of proof in a testing or disparate impact case, but not in a disparate treatment case, that is, one not involving any test or screening device. Therefore, an employment decision based upon a direct evaluation of absolute or relative qualifications, without an intervening screening device, need not be justified by business necessity. *Griggs*, 401 U.S. at 431, 434; *Teamsters*, 431 U.S. at 358. Indeed, since a test to be valid must be "shown to be related to job performance", job performance itself automatically fulfills this requirement.

The effect of the Fifth Circuit's opinion is to require every deviation from statistical "balance" to be justified by "business necessity" which it defines in effect as proof of absolute indispensibility.[29] This has taken a phrase from *Griggs* out of con-

---

[29]But see Chandler, "The Business Necessity Defense to Disparate-Impact Liability Under Title VII", 46 U.Chi.L.R. 911, 933 (1980): "The theoretical underpinnings of the ... defense, the legislative history of Title VII, and the Supreme Court's interpretations of that history all suggest that business necessity means nothing more than legitimate business purpose. The higher standard of business necessity adopted by the lower courts is fundamentally inconsistent with the equal-treatment rationale of the Act." Compare A. 175, where it is said that business necessity means an employer must show his actions were "essential to ... safety and efficiency."

text so as to apply it not only to tests and artificial screening criteria, but to promotion decisions based on relative job performance, and to non-attainment of statistical "balance". The practical result is to impose mandatory involuntary quotas.

For the above reasons, petitioner humbly prays that the writ of certiorari be granted.

Samuel H. Burr

C. V. Stelzenmuller

1600 Bank for Savings Building
Birmingham, Alabama 35203

F. B. SNYDER

200 South Michigan Avenue
Chicago, Illinois 60604

Attorneys for Petitioner

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203

Of Counsel

80-1190

No.

Supreme Court, U.S.
FILED
JAN 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAMUEL H. BURR
C. V. STELZENMULLER
1600 Bank for Savings Building
Birmingham, Alabama 35203

F. B. SNYDER
200 South Michigan Avenue
Chicago, Illinois 60604
Attorneys for Petitioner
Pullman-Standard

THOMAS, TALIAFERRO, FORMAN, BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
Of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TABLE OF CONTENTS

Appendix A - Opinion of U.S. District Court, N.D.Ala., dated Sept. 13, 1974 ..... A-1

Appendix B - Opinion of U.S. Court of Appeals, 5th Circuit, dated Aug. 30, 1976..... A-45

Appendix C - Opinion of District Court dated July 5, 1977 ..... A-100

Appendix D - Order of District Court dated Oct. 11, 1977 ..... A-124

Appendix E - Opinion of District Court dated May 5, 1978 ..... A-128

Appendix F - Opinion of U.S. Court of Appeals dated Aug. 18, 1980 ..... A-153

Appendix G - Statutes (Title VII of Civil Rights Act of 1964 and Civil Rights Act of 1866) A-180

Swint v. Pullman-Standard
U.S. District Court,
Northern District of Alabama

SWINT, *et al.* v. PULLMAN—STANDARD, Bessemer, Alabama, UNITED STEELWORKERS OF AMERICA LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and IAM, LOCAL LODGE 372, No. 71-955-S, September 13, 1974

Civil Rights Acts of 1866 and 1964

—Seniority—Departmental seniority system ► 108.3315

Departmental seniority system is not per se violative of Title VII or 42 U.S.C. § 1981, but is unlawful only if applied in discriminatory manner or if it locks in effect of present or past discrimination in departmental or job assignments.

—Seniority—Departmental seniority system ► 108.3315 ► 108.3370

Employer that maintains departmental seniority system is not violating 42 U.S.C. § 1981 or Title VII, since this system is not perpetuating effects of prior discrimination against black employees. (1) Under agreement with U.S. Department of Labor, black employees affected by prior discrimination are given transfer rights with carryover of plant seniority, and what little racial identification of job classifications still can be discerned either by doctrine of waiver or that of estoppel from thereafter suing under 42 U.S.C. § 1981 for relief not provided by award.

Civil Rights Acts of 1866 and 1964

—Racial discrimination—Retaliation—Discharge ► 108.3025

Employer did not violate 42 U.S.C. § 1981 or Title VII when it discharged, for insubordination, two black employees both of whom had filed charges with EEOC and one of whom also had been active on plant civil rights committee. (1) Employer had ample reason for believing employees guilty of insubordination, as well as of other prior derelictions in employment; (2) there is no evidence from which it might be inferred that they were discharged because they were black; (3) it does not appear that persons who made decision to discharge employees were even aware of filing of charges; (4) no other employee who had filed charge or served on civil rights committee was retaliated against.

—Attorneys' fees—Costs—Recovery by employer and union ► 108.8915 ► 108.8950

Employer and union that prevailed in employees' action under 42 U.S.C. § 1981 and Title VII are not entitled to award of attorneys' fees and costs, since (1) it is quite possible that action has played some therapeutic role in bringing about employer's agreement with U.S. Department of Labor to enter into corrective action program and strides made by employer in fashioning its affirmative action plans; (2) exposure of employer's employment practices has not been without some benefit to both employer and union; (3) counsel for employees displayed unusual ability, fairness, and industry.

Action under 42 U.S.C. § 1981 and Title VII of Civil Rights Act of 1964 by black employees against employer and unions. Employer's agreement with U.S. Department of Labor modified and applied to unions, and judgment otherwise for employer and unions.

U.W. Clemon (Adams, Baker & Clemon), Birmingham, Ala., and Jack Greenberg and Marilyn Holifield, New York, N.Y. for plaintiffs.

C.V. Stelzenmuller (Thomas, Taliaferro, Forman, Burr & Murray), Birmingham, Ala., for defendant employer.

John C. Falkenberry (Cooper, Mitch & Crawford), Birmingham, Ala., for Steelworker defendants.

Full Text of Opinion

SAM C. POINTER, Jr., District Judge:—This case involves individual and class claims of racial discrimination in certain employment practices of Pullman at its Bessemer, Alabama, Plant. In part, the claims are also made against the United Steelworkers of America, AFL-CIO, and it Local 1466. Individual notice to class members was not required by the court;[1] but company bulletin boards were used to advise employees of the pendency and nature of the litigation and to explain how they could make known to the parties evidence thought to have some bearing on the case. While pretrial conferences succeeded, with the agreement of counsel, in limiting the issues to five in number,[2] some sixteen days of trial were consumed in the presentation of evidence, in large part due to the leeway permitted in such cases for introduction of matters having potential circumstantial relevance.

Overview

Pullman-Standard, a division of Pullman, Inc., is the world's largest manufacturer of railway freight cars and parts. Operations at its Bessemer plant are geared to special orders, rather than the production of an inventory, and accordingly are conducted much like a custom steel fabricating shop, though on a larger scale.[3] This method of production, coupled with sporadic market demands from the railroad industry, results in frequent

[1]All footnotes for this section appear at the end of this Appendix, pp. A-32-A-44.

and dramatic fluctuations in the level of employment.[4] Since the early 1940's, most[5] of the production and maintenance workers at Bessemer have been represented by the United Steelworkers, which also holds representation status at Pullman-Standard's other three plants; and key provisions dealing with seniority rights are largely covered by local rules at the individual plants rather than by the company-wide triennial collective bargaining contracts.

The production and maintenance jobs at Bessemer, over a hundred in number,[6] are divided among 25 different departments of varying sizes.[7] Each job has a specified job class (JC) level, which determines its relative ranking in base pay in comparison to other jobs.[8] All but two departments, Janitors and Template, have more than one job classification; and most, but not all, clasifications will be worked by more than a single employee during peak employment periods. One such job (Welder) sometimes is worked by over 500 employees.

[Seniority System]

Under the local rules at Bessemer, seniority is measured by continuous service in a particular department and is exercised in competition with all other employees in that department, there being no lines of promotion or progression in any department. Seniority rosters are maintained by department; and departmental age is basically the sole criterion used to determine who is rolled back or laid-off in the event of reductions, and who is recalled or promoted (assuming ability to do the work) in the event of force increases or other vacancies, in the department. It is somewhat inappropriate to talk about "permanent jobs" at Bessemer, except perhaps with respect to the most senior employees in the department; for the constant fluctuations in job requirements and employment levels cause frequent movement of employees from one job to another. While the seniority rosters do indicate a job classification for each employee, these

designations do not reflect his[9] permanent job, but rather constitute a recognition by the company that the employee has satisfactorily performed the job and is thereby protected under the collective bargaining agreement against rejection in favor of a junior employee on the factor of relative ability. The rosters are updated annually as of June 1st; and frequently only the highest job class which an employee has satisfactorily performed is shown for him.

From the study of payroll information for the 18 month period ending June 1974, it appears that 49.5% of the work force is black, a ratio which is comparable to that which existed in June 1965.[10] Understandably, plaintiffs do not assert that Pullman's initial hiring policies, as such are now or ever have been racially discriminatory.[11] Plaintiffs do, however, contend that assignment of new hires to the several departments was discriminatory, and continued so for several years following the passage of Title VII. Further, the plaintiffs contend—with very little dispute[12]—that prior to June 1965 a number of the better jobs, including supervisory positions, were "white only" and a number of the lower-paying jobs were "black only."

[Program Implemented]

In early 1965, spurred by an arbitration decision which opened up the then all-white Rivet Driver job to blacks,[13] the company began implementing a program to eliminate barriers to advancement by blacks and, in general, to conform to the impending requirements of Title VII where possible infractions were detected. Black buckers and welder helpers were given trials to ascertain their abilities as rivet drivers and welders, respectively. Beginning in June 1965 black employees were appointed as hourly foremen. A reporting system of hires and promotions was undertaken, as were efforts to recruit blacks for the more highly skilled positions. In early 1966 an agreement was made with the union to utilize seniority in the filling of temporary

vacancies.[14] Negotiations were commenced in 1968 with the Department of Labor, which led in January 1969 to a conditional memorandum of understanding designed t o enhance opportunities for blacks.[15] Although this memorandum never became fully effective due to lack of union acceptance, Pullman through its Contract Compliance Officers—one black and one white—began encouraging black employees in certain "low ceiling" departments to transfer to other departments and monitoring the filling of temporary vacancies to assure a fair allotment to black employees. Black employees and their families were encouraged to participate in vocational education at the company's expense, a program that has been particulary significant in the training of black welders.[16]

In May 1972 Pullman entered into an agreement with the Department of Labor to serve as a corrective action program and to bring its employment practices into compliance with Executive Order 11246 as amended.[17] Of the many provisions in the twenty-five page agreement, the most significant to the issues in this case are those relating to inter-departmental transfers. Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments (Template, Powerhouse, Airbrake Pipe Shop, Inspection, and Plant Protection); and those hired before April 30, 1965, who had been assigned to four "low-ceiling" departments (Janitor, Die & Tool, Truck and Steel Miscellaneous) are given preference for vacancies arising in any of the departments.[18] These transfer rights are without limit as to time; and, when exercised, the employee vies for promotions in the new department using his total plant age.[19] For layoff and recall purposes, the employee is given at the time of the transfer the option either to take his plant age into the new department or to keep accruing seniority in his old department while building new age for such purposes in the new department. Retreat rights to the employee's prior

job are provided should he fail to qualify for at least a JC 4 job or is disqualified for a promotion in the new department; and in such event the employee may have the right to go to another department rather than return to his original one.

[Class Issues]

For determination in this cause are four claims of class discrimination[20] and a claim of individual discrimination by two employees. The class issues are as follows:

> (1) Does the system of departmental seniority, even with the changes made under the agreement with the Department of Labor, perpetuate the effects of past discrimination in the assignment of black employees among the various departments?[21]
>
> (2) Has there been discrimination in the assignment of work to persons having the same job title or in the assignment of jobs having the same JC level to the persons entitled to jobs of such JC level?
>
> (3) Has there been discrimination in the promotion of persons to supervisory positions?
>
> (4) Has there been discrimination in the failure to post publicly a list of changes in assignments?

One of the named plaintiffs, Louis Swint, and an intervenor-plaintiff, Clyde Humphrey, each claim that their discharges by the company in May 1971 and November 1972, respectively, were racially motivated or were in retaliation for their having earlier filed charges with the EEOC.[22]

I. Departmental Seniority

Notwithstanding the provisions of 42 U.S.C.A. § 2000e-2(h), exculpating "bona fide" seniority systems, it is clear that a

departmental seniority system, "neutral" on its face, may yet be an impermissible instrument for discriminating, or perpetuating the effects of past discrimination, against employees because of race or color. This may result when there is, or has been, discrimination in the assignment of black employees among the departments by exclusively or disproportionately assigning white hires to higher-paying departments and black hires to lower-paying jobs. See, e.g., Franks v. Bowman Transportation Co., 495 F.2d 398, 8 FEP Cases 66 (CA 5 1974)[23]; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 7 FEP Cases 627 (CA 5 1974). Indeed, in other cases presented to it, this court has concluded that eradication of the effects of past discrimination required use of plant-wide seniority with transfer rights. See, e.g., U.S. v. United States Steel Corp., 371 F.Supp. 1045, 7 FEP Cases 322 (1973).

A departmental seniority system, however, is not *per se* violative of Title VII or § 1981. Rather, such a system is pernicious only if it is applied in a discriminatory manner[24] or if, as is more commonly the situation, it locks in the effects of present or past discrimination in departmental or job assignments.[25] For example, in the Johnson case, where seven of Goodyear's departments had been white-only and the other (Labor) had been black-only,[26] the use of departmental age tended to frustrate the therapeutic effects of a 1968 rule permitting interdepartmental transfers. Likewise, in the Franks case, black employees had been confined solely to a single division of a single department in jobs that "require the most menial work and bring the lowest pay."

[Critical Inquiry]

A critical inquiry is to what extent—and with what effect—has there been discrimination in the assignment of employees to the various departments. The following chart, prepared by the court, reflects by department, ranked by job

class ranges, the racial composition of the work force in June 1965, together with certain accumulating percentage figures.[27]

Five of the ddepartments—all but one being in the upper hall of the ranking—were all-white; and three—all on the bottom—were all-black. Pullman does not really deny that to perpetuate the effects of such assignments would be violative of Title VII. However, under its agreement with the Department of Labor, the black employees affected by such prior discrimination are given transfer rights with carry-forward of total plant seniority. It is not without significance that, of the assignments to the formerly all-white departments since the agreement, the only assignments to the Template, Powerhouse and Plant Protection departments have been of black employees and over half of the assignments to the Airbrake and Inspection departments have been of black employees.

Department/JC	#B	#W	%B	%W	%B	%W	%B	%W
			I.		II.		III.	
1. Template 2-20	0	9	0	0.77	—	—	—	—
2. Maint. 4-18	26	98	2.26	9.12	2.54	8.98	—	—
3. Forge 1-17	12	20	3.30	10.06	3.71	10.81	1.43	6.35
4. Power. 6-16	0	4	3.30	11.17	—	—	—	—
5. Inspec. 12-13	0	28	3.30	13.55	—	—	—	—
6. Punch & S 1-13	120	28	13.73	15.94	15.41	13.38	15.75	15.24
7. Mob. Cr. 5-12	3	2	13.99	16.11	15.71	13.56	16.11	15.87
8. Press 1-12	48	17	18.16	17.56	20.39	15.12	21.84	21.27
9. Rail. 7-11	8	10	18.85	18.41	21.17	16.03	22.79	24.44
10. Air Brake 6-11	0	27	18.85	20.72	—	—	—	—
11. S. Const. 1-11	124	18	29.63	22.25	33.27	17.69	37.59	30.16
12. Paint ST 1-11	91	84	37.53	29.41	42.15	25.39	48.45	56.83
13. S. Erec. 1-11	290	41	62.73	32.91	70.44	29.14	83.05	69.84
14. W. Erec. 1-11	65	35	68.37	35.89	76.78	32.35	90.81	80.95
15. W. Mill 1-11	7	17	68.98	37.34	77.46	33.91	91.65	86.35
16. Welding 1-10	161	678	82.97	95.14	93.17	96.05	—	—
17. Wheel & A 1-10	13	30	84.10	96.84	94.44	97.88	93.20	92.70
18. S. Misc. 2-9	86	2	91.57	97.01	—	—	—	—
19. S. Stores 2-9	45	10	95.48	97.87	98.83	98.80	98.57	95.87
20. P. Protec. 6-8	0	12	95.48	98.89	—	—	—	—
21. L. Stores 3-8	5	7	95.92	99.49	99.32	99.44	99.16	98.10
22. M. Stores 3-8	7	6	96.52	100	100	100	100	
23. Truck 1-6	21	0	98.35	100	—	—	—	—
24. D & T 1-5	9	0	99.13	100	—	—	—	—
25. Janitor 1	10	0	100	100	—	—	—	—
	1151	1173						

[Column II]

Attention therefore should in this case be directed to the percentage column II, which portrays the distribution by race excluding those departments covered by the agreement; i.e., the eight one-race departments and the Steel Miscellaneous department. This reveals that, while only in five of the sixteen departments (Mobile Crane, Railroad, Paint and Shipping Track, Lumber Stores, and Miscellaneous Stores) was the racial composition of the department approximately equal to the ratio for the total of all such departments,[28] yet there was no pattern of favoritism to whites in the departmental assignments. Indeed, on balance, blacks as a group appeared to receive somewhat of an edge in such assignments.

Special consideration must be given to the significance of the data respecting composition of the Maintenance and Welding departments. A high proportion of the jobs in these two departments require special skills; and yet, as previously noted, the positions are not arranged in lines of progression through which one, by assignment to entry level positions, can acquire the necessary training and experience to qualify. Accordingly, those positions typically have been filled by "off-the-street" employment of persons already possessing requisite qualifications. Bare statistics showing only the racial composition of the employees in those departments do not—absent a study of the qualifications of the applicants or at least a showing of examples in which qualified blacks were not assigned to such departments—evidence discriminatory assignments thereto. There has been no such study of applicants, nor indeed has there been any showing that the company declined to assign a qualified black employee or applicant to either black employee or applicant to either of the departments. Accordingly, a more realistic picture of departmental distribution of employees by race insofar as pertinent to the issues in this case is given in percentage column III of the chart. With perhaps one excep-

tion—the Forge department—the conclusion must be drawn that black employees were not adversely affected by such disproportionate departmental assignments as existed at the Bessemer plant.

[Forge Department]

Even with the Forge department an uncritical acceptance of the data can be deceiving. For although in June 1965 there were 12 blacks and 20 whites on its departmental seniority roster, other evidence shows that there has not been discrimination against blacks in the assignment of personnel to this "good" department. Indeed, just three years earlier, blacks constituted 47% of the Forge department while representing less than 42% of the total plant work force. (See Px-21).

Of course changes in the racial composition of the departments occur over time due to new hires and assignments and terminations. A study of the company's assignments from 1965 to 1974 discloses an obvious effect by Pullman to "correct" the racial imbalances in the departments. Those departments which in 1965 had been predominantly of one race are, without exception, closer in 1973 to the racial ration for the plant as a whole; and those departments which had been exclusively of one race are, with one exception, no longer "segregated". While the Janitors department is reflect as all-black in 1973, it should be noted that during the 1965-73 period two whites had been assigned to it, but subsequently quit.[29] A chart prepared by the court (not reproduced in this opinion) similar to that for June 1965 reflects that in June 1973 38.24% of the black employees in the sixteen departments not covered by the agreement (and 26.-44% of the whites) were assigned to departments in the upper-half of departmental ranking; and approximately 5% of each racial group was assigned to the four "bottom" such departments.

A study based on seniority rosters suffers in that it does not, of course, show actual work forces at any particular period. The only source in the evidence for making such a study is a compilation (page 74 of DX-351) which reflects for all but the smallest departments the monthly averages for the period December 1972 to June 1974 of the actual number of persons, with racial percentages, who drew checks during the month. In the court's study of such data, put into a form similar to that shown in percentage column III of the June 1965 seniority study for those departments for which the information was available, it was found that 40% of the blacks drawing paychecks were in departments in the upper-half of the department rankings, as compared to 36% of the whites.

[Contention]

In support of their attack upon Pullman's departmental seniority system,[9] the plaintiffs have by a series of exhibits, PX-41 thru PX-50, asserted that 92% of the jobs were segregated, i.e., "white only" or "black only", in 1962, and that 49% of the jobs were segregated even in 1973. A major difficulty with this approach is that it accords the same statistical significance to a job classification held by a few employees as to one held by scores or hundreds. If the number of employees in particular classifications is taken into account, it appears that less then 7% of the 2,900-plus employees on the 1973 seniority roster held "white only" or "black only" classifications. Moreover, to be meaningful, the calculations should be adjusted so as not to treat as "segregated" those classifications (1) which are one-man jobs (and hence necessarily of only one race); (2) which in prior years have been held by employees of both races (by looking at the seniority lists from 1966 through 1973); or (3) which are held by both races in other departments (e.g., the hook-on classification in four departments was held in 1973 only by blacks, but the same job in two other departments

was held by both blacks and whites). If this adjustment is made, it appears that less than 3% of the employees held "segregated" classifications according to the 1973 seniority roster.

As to the putative effect of such segregation, only 9 blacks have "segregated" classifications below JC 8; and only 14 whites have "segregated" classifications above JC 13. Twelve of these whites have the classification of Electrician Motor Inspector (JC 16) while in the same department (Maintenance) there is a black employee with the classification of Electrician Wireman-Craft (JC 18), and the other 2 whites hold the classification of Powerhouse Operator, in which there have been no vacancies in over 20 years. If one disregards those "white-only" classifications where a black employee in the same department has held another classification of equal or greater JC level, it appears that only 14 whites in 1973 held "segregated, higher" classifications: 2 at the JC 7 level, 7 at the JC 8 level, 3 at the JC 10 level, and 2 at the JC 16 level. In the two higher classifications (JC 10 and 16), there have been no vacancies since 1965.

[Job Classifications]

The difficulty with using seniority rosters, rather than actual work assignments, is even more pronounced in a study of job classifications than in one of the departental assignments. As previously indicated, the seniority rosters reflect the job classifications as to which the employee has demonstrated satisfactory performance so as not thereafter to be questioned as to "relative" ability, and frequently only the highest rated job as to which he has so demonstrated his ability is shown on the roster. Typically, an employee is considered as qualified—and during periods of force reductions will work—jobs in the department lower than that shown for him on the roster. Accordingly, for example, to treat only black employees as holding the classification in the maintenance department as

Oiler or Helper is somewhat misleading, since there are whites having higher rated classifications in the department who are considered as possessing such qualifications. Employees will also on occasion work jobs higher than the classification shown for them on the seniority rosters. Finally, the number of persons holding a given classification on the seniority rosters is not necessarily a reliable means for determining the actual number of persons who will be working that job even at times of high production; and, indeed, if one looks at the number of white employees who at high employment will actually be working a "segregated" job (as to which some vacancy has existed since 1965) which has a higher job class than those at which blacks are working in that department, only 3 whites will be so "favored", and they are at the JC 7 and JC 8 levels.

The foregoing analysis should not be understood as denying the existence of segregation of jobs in the past. Indeed, until mid-1965, such practices significantly discriminated against black employees; and the effects thereof lingered, with diminishing extent, over the following years. Rather, what it does indicate is that the changes which were then made — the opening up of jobs to blacks through permitting them actually to use their departmental seniority to obtain better jobs—are remedying[1] (rather than perpetuating) the effects of such past job discrimination. What little racial identification of job classifications can still be discerned is basically due to the time lag which is an inherent quality of "rightful place" remedies.

Supportive of the conclusion that the seniority system at Bessemer is not perpetuating the effects of prior discrimination are the earnings figures submitted into evidence. The average earnings for black employees in comparison to those of white employees has risen steadily, such that by 1973 the average total earnings for black employees was $7,031, or 96.-8% of the average total earnings for whites, $7,259. If one could eliminate from such calculations those whites holding high-paying jobs

due to craft status or pre-1965 incumbency, it is clear that earnings of blacks would be on a parity with, or somewhat above, those of comparable white employees. Moreover, though not capable of measurement, there are potential opportunities for further increases in relative earnings for blacks due to the transfer rights under the agreement from some of the lower paying departments and to some of the higher paying departments.

[Two Narrow Attacks]

Deserving of special consideration are two rather narrow attacks made by the plaintiffs upon the departmental seniority system as altered by the agreement with the Department of Labor; namely, that the transfer rights under the agreement are inadequate for failing to provide "red-circling" and for limiting the privilege to persons employed before April 30, 1965. These contentions are not dependent upon establishing discrimination in assignments other than in the nine departments covered by the agreement, and, as implied earlier in the decision, the court does conclude that there was such discrimination regarding those departments (though not as regards the other sixteen departments).

"Red-circling" is, of course, a standard remedy in cases of past discrimination, frequently necessary "since otherwise employees could not afford to take *training* jobs paying lower wages;" Pettway v. Acipco 494 F.2d 211, 248 n. 99, 7 FEP Cases 1115, 1144 (CA5 1974); and this court has mandated its use in other Title VII cases. Where the job from which the employee transfers pays more than the new job and the new job is in a department where the top wage rate is greater than rates in the old department, the employee is "red-circled", i.e., paid at his old wage rate until he advances to a job paying more or voluntarily freezes at the new job.

The court concludes that under the particular circumstances of this case, however, red-circling is not appropriate respecting the nine transfer departments. Virtually all of the jobs in the transfer-out departments have lower JC levels than the lowest JC jobs in the transfer-in departments. More significantly perhaps, there are no lines of promotion or residency requirements to impede promotions in the new department; and the frequent fluctuations in employment levels at Bessemer create many opportunities for advancement in the new department, as well as obfuscate the meaning of an employee's "old wage rate". Nor, except in a very loose sense, are there "training" jobs in the new departments. Finally, it should be noted that, in the evidence presented to the court concerning turndowns or disinterest in transfers under the agreement, the key feature seemed to be confusion or apprehension concerning seniority carry-over and retreat rights,[12] and not the risk of possible diminished wage rates.

While tacitly admitting—as indeed they must—that in the last several years Pullman has abandoned any discrimination in making assignments to the nine departments covered by the agreement, the plaintiffs contend that this change was not made immediately on April 30, 1965. Plaintiffs assert that discrimination in assignments to such departments continued for a number of years thereafter; and that, accordingly, transfer rights accorded under the agreement should be extended to black employees hired prior to, for example, June 1, 1969. In the court's opinion the situation regarding each department should be given separate consideration.

[Assignment Practices]

The court has studied the yearly seniority rosters to ascertain the assignment practices of the company in the years following April 30, 1965, looking to those who "survived" in the department long enough to be listed on the seniority roster published

after their assignment. As to the formerly all-white departments: blacks did not make the Air Brake seniority list until the 1971-72 period, although 6 whites previously had been added to the list subsequent to June 1, 1965; no black made the Inspection department list until the 1970-71 period, although 7 whites previously had been added after June 1, 1965; a black employee made the Plant Protection list in 1967-68, but a white employee had been added in the prior year; in the Template and Powerhouse departments the first (and only) person added after June 1, 1965, has been a black employee. As to the formerly all-black departments: the first whites were added to the Truck department in 1968-69, and one black previously had been added after June 1, 1965; the first whites were added to Die & Tool in 1971-72, but 2 blacks previously had been assigned subsequent to June 1, 1965; the first white was assigned to the Janitors department in 1967-68, but two black employees previously had been added after June 1, 1965. Respecting the Steel Miscellaneous department, four of the first thirteen employees added were white.

The court concludes, largely on the basis of the foregoing statistics, that the company did not abandon racially discriminatory assignment practices regarding the Janitors and Plant Protection departments until June 1, 1967, regarding the Truck department until June 1, 1968, regarding the Inspection department until June 1, 1970, and regarding the Die and Tool and Air Brake departments until June 1, 1971. The court concludes that discriminatory assignments were not made after April 30, 1965, respecting the Template, Powerhouse and Steel Miscellaneous departments.

[Remedy]

Based upon the foregoing conclusions, the defendants are directed (1) to expand" the definition of the "affected class" as

contained in paragraph one of the agreement (the "transfer-out" group) to those black employees assigned to the Janitors department who were employed prior to June 1, 1967, assigned to the Truck department who were employed prior to June 1, 1968, or assigned to the Die & Tool department who were employeed prior to June 1, 1971; and (2) for purposes of "transfer-in" to the Plant Protection, Inspection and Air Brake departments under paragraph two of the agreement, to add[14] to the list of eligible black employees those who were employed prior to June 1, 1967, June 1, 1970, and June 1, 1971, respectively.

Other than to the limited extent indicated in the preceding paragraph, the plaintiffs' attacks upon the departmental seniority system (as altered by the agreement with the Department of Labor) are denied. With the exception of nine departments, the evidence does not indicate any past or present policy of racially discriminatory assignments. As to those nine departments infected by past discrimination in assignments, the effects thereof are not being perpetuated by the present system with its transfer rights (as partially modified by the court in the preceding paragraph). It is not without significance that the Steelworkers local, which was organized principally by blacks, and whose policies over the years have been shaped as much by blacks as by whites, has advocated departmental seniority and, indeed, within the past several years, has rejected by unanimous vote a company proposal to merge several of the departments. Finding no statutory violations, it is unnecessary for the court to deal with the company's rear-line defense of business necessity.

II. Work Within Same Job Class

With one exception to be discussed infra, management has the sole authority under the collective bargaining agreement to assign work among employees working in a given job class in a department.[15] For example, a rivet driver has no voice in the

decision whether he is to drive rivets on the roof, or on a "top corner," or along the side, etc. While his pay in any event is the same,[16] the individual riveter frequently as personal likes and dislikes about particular assignments. Likewise, the company can transfer, without regard to seniority, an employee from one JC 6 job to another JC 6 job in the same department, such "lateral" transfer being within the management prerogative provisions of the labor contract. Here again, a particular lateral assignment may be distasteful to the individual employee.

The plaintiffs claim that, in exercising this discretion, Pullman gives the more dsirable assignments to white employees and the less desirable ones to blacks. Certainly such a practice, if established, would be violative of the anti-discrimination statutes notwithstanding the provisions of the collective bargaining agreement."

[Evidence]

Neither the claim, nor its denial, is susceptible of proof by direct statistical means; and, in essence, the plaintiffs rely upon purported examples of such discriminatory assignments, coupled with evidence of other acts and practices indicative of bias against black workers by a predominantly white group of foremen.[18] In support of its denial, aside from noting that the burden of proof is upon the plaintiffs, the company has offered evidence to show that the differences in jobs are merely matters of individual preference, that best utilization of skills is the criterion for such decisions (and not racial considerations), and that, under the business necessity doctrine, employees cannot be given the right to choose their own particular work assignments.

It is clear from the evidence that many—perhaps most—employees believe that some work assignments are better or worse than others. It is clear that many black employees who have received, in their opinion, a "bad" assignment from a

white foreman, consider the situation one of racial prejudice. The court must, of course, examine for itself the reality of the labels so placed by the witnesses."

Yet the evidence is also clear that there is no general agreement among the employees as to which are the better, or the worse, work assignments for their job classification. Some riveters considered roof work exceptionally dirty; another liked it because he could kneel and work in a downward position; some preferred positions where there was no "O.K." (Corrective) work, and others considered "top corner" work good although it involved "O.K." work. Some spray painters liked the elevator-like platforms to work from; others preferred the old scaffolding method; some thought stencilling better work, but a stenciller, musing about the fumes when cleaning stencils, though otherwise. Evidence about other work assignments has the same theme: in short, "the grass looks greener. . . ." The court cannot conclude from the evidence that in fact some particular work assignments are objectively better or worse than others, either from the characterizations given by the employees or from a consideration of the particular functions to be performed.

[Typical Situation]

Indeed, the typical situation of assertedly racial discrimination as presented to the court involved the assignment of work as between two or more black employees. In a few instances, the complaint did relate to a white employee receiving a "better" assignment, or a black receiving a "worse" one; but the evidence also showed that on other occasions this "better" assignment was given to blacks and this "worse" one to whites. Significantly, the assignments being criticized by the witnesses had been made by white, black, and Spanish-surnamed foremen.

Testifying were a number of foremen, both white and black, including some who have since returned to the bargaining unit. Without exception, they attested to the fact that their assignment decisions had been based on their assessment of the relative skills and limitations of their crew, mindful of their responsibility to complete the assigned work properly and on schedule. For example, some welders cannot satisfactorily do certain types of welding at all. Racial considerations, according to the foremen, have not been involved so far as they are concerned or have observed. Foremen do tend to keep an employee on a particular job so long as he is doing satisfactory work and is not needed more on another position—this for the reason that the crew is more efficient when the men are accustomed to the particular details of their assignment—and they may listen to an employee's preference and, on occasion, honor that preference. Nevertheless, the foremen, both black and white, insist that assignments must be left to them rather than to a selection process by the individual workers, at least if that would be a frequent matter.[40]

[Evidence Unconvincing]

The evidence taken as a whole is unconvincing that blacks are being discriminated against in the assignment of work.[41] The dissatisfaction with work assignments at Pullman is basically an employer-employee dispute, not a black-white problem. In part, this conclusion finds support in the fact that in the last collective bargaining negotiations the union had a proposal, similar to the relief being sought by plaintiffs under this issue of the case, for permitting employees to use seniority rights in the selection of work assignments throughout the plant. While such a proposal might be beneficial to black employees (as well as to whites), there is no violation of the anti-discrimination statutes from the failure of a company to accord to blacks all that they want or all that might be beneficial to them. The court's function is not that of master mediator for the benefit of black employees or

for white employees. One might as well come to the court for a mandate to raise wage levels at the plant, an action that no doubt would meet with favor from all black and white workers.

Indeed, it is not merely the plaintiffs and the union, but on a related issue the company as well, that would have this court fight their collective bargaining battles under the guise of remedying discrimination. The company's invitation relates to the one situation in the plant where employee selection of work assignments is permitted—the "sub-assembly" work in the Welding department. As a result of an arbitration proceeding some ten years ago, Pullman was forced to institute a system whereby welders can use their seniority to "sign-up" for certain sub-assembly work at the start of large orders. Opportunities for incentive bonuses are generally better for these jobs than for other welding work, in large part due to the smaller crews on sub-assembly work. Since the welders with the greatest departmental age are predominantly white, the company asks that the court abolish this sign-up procedure.[42]

However, since the court has found no racial discrimination in the assignment of personnel to the Welding department, there is no basis for invalidating[43] the departmental seniority arrangement for sub-assembly work, a facially neutral system which is "bona fide" and is not the result of an intention to discriminate because of race or color.[44] 42 U.S.C.A. § 2000(e)-2(h). That such a system may benefit one race more than another is, absent proof of other discrimination being perpetuated thereby, insufficient—one might as well contend that where white employees on the average have more company, plant, departmental, LOP and job age, no seniority system could be used, or that blacks would have to be given pre-employment credit. Cf. Franks v. Bowman Transportation Co., 495 F.2d 398, 8 FEP Cases 66 (CA5 1974). Here again, finding no statutory violation, the court must reject the company's invitation to adopt its unsuccessful collective bargaining position.

All attacks upon the practices regarding assignment of work within the same job class positions, whether made by plaintiffs, company, or union, are denied; and the parties are left instead to the collective bargaining forum.

III. Promotions to Foreman

Prior to June 1965 there were no black foremen. At the time of trial only approximately 10% of the salaried foremen were black. Only one black has become a "B" foreman. Several blacks have asked for foreman positions, yet not been selected. Selection of foremen is made by an all-white group of supervisors, without any objective standards or tests. This, in essence, is the basis[45] for plaintiffs' claim of discrimination respecting promotions[46] to supervisory positions; and it has obvious appeal.

The front line in the supervisory ranks is the hourly foreman, typically an employee promoted from the bargaining unit in the department to supervise a crew of his former co-workers. Supervising the work done under several houly foremen will by an "A" foreman, who is salaried. The next step is the "B" foreman, and above that comes the Department Head. Hourly foremen are frequently moved back and forth between their supervisory positions and work in the bargaining unit, there being concomitant changes in the needs for supervision as the level of employment in the department rises and falls.[47] The company attempts to limit the number of salaried positions to that which can be given reasonable job security, and selects a foreman from the ranks of successful hourly foremen.

[Key To Issue]

The key to this issue lies in the analysis of Pullman's practices regarding promotion of hourly foreman, for that is the source for higher promotions. Since mid-1965, some 56 blacks—ap-

proximately one-third of the total number—have been appointed as hourly foremen; and the percentage would be higher if the first few years of the period were disregarded. While this is lower than the percentage of blacks in the total workforce, several factors must be taken into consideration. First, it appears that a greater proportion of black than white employees, particularly among those with more experience with the company, fall into the functionally illiterate or minimally literate classifications, and accordingly are less likely candidates for supervisory positions.[48] Secondly, a greater proportion of blacks than whites have turned down opportunities to become hourly foremen.[49] Additionally, due to pre-1965 segregation of jobs, it has taken some time for blacks to learn the range of job skills necessary in many cases to performance of supervisory duties. The statistical evidence, fairly considered, does not support any claim of discrimination since 1965 in making appointments of hourly foremen; and the few instances of individual passovers are likewise unpersuasive.[50]

Inasmuch as blacks constitute a minority—for the reasons indicated above—of group of persons who have served as hourly foremen, it is to be expected likewise that there would be a minority of blacks raised to salaried foremen's positions. Data reflects that approximately 20% of such promotions since mid-1965 have been of blacks, a percentage that is not really disproportionate to the composition of the source group when one takes into account the pre-1965 hourly foremen (all white) and the necessity of some lag time for demonstration of satisfactory performance as an hourly foreman. Thus, while for the 1965-68 period only 4 of the 35 such promotions were of black employees, by the 1971-74 period 8 of 20 were blacks, a ratio higher than the percentage of blacks in the source group. One black hourly foreman testified that when recently complaining that the hadn't been put on salary, he was told that the company was attempting to use a "one-for-one" promotional ratio to salaried positions where possible.[51]

[Subjective Evaluation]

Selection of foremen has been largely a matter of subjective evaluation[32] by an all-white group of supervisors,[33] a fact which provides a ready-made opportunity for discrimination and which in other cases has added weight to inferences of bias drawn from statistical evidence. E.g., Rowe v. General Motors Corp., 457 F. 2d 348, 4 FEP Cases 445 (CA5 1972). But the lack of objective criteria—and in the selection of supervisors it is difficult [34] to arrive at such criteria without at the same time running the risk of potentially unlawful testing or educational requirements—is not itself a statutory violation or, indeed, necessarily even evidence of such a violation. See, e.g., Pettway v. Acipco. 494 F.2d 211, 7 FEP Cases 1115 (CA5 1974) (remanding for a consideration of the effect, if any, of using subjective evaluation). In the case *sub judice,* the court concludes that the statistical evidence, properly evaluated, is not supportive of a claim of discrimination in supervisory appointments in recent years and that there is no evidence of blacks during this period having been passed over in favor of less qualified whites. It must, therefore, follow that the use of subjective judgment in selecting foremen likewise is not shown to be a discriminatory employment practice.

In summary, upon a consideration of the whole of the pertinent evidence—and not merely those parts highlighted by plaintiffs—, the conclusion must be reached that the claim of racial discrimination in promotion of employees to foremen positions has not been proved and is therefore to be denied.

IV. Posting of Assignments

To the outside observer, the exercise of seniority rights for promotion, roll-back, layoff or recall purposes would appear to be fraught with difficulties. There is no bidding procedure, or even posting, of vacancies; nor is there even after-the-fact

notification of changes in assignments. Pullman notes that it has always been this way, for the very good reason that daily changes in employment levels and in assignments makes a bidding procedure impossible and a posting of assignments unnecessarily burdensome. According to Pullman, the recent innovation of publicly posting its daily turn-over sheets (indicating hires, terminations, layoffs, and recalls) really is of little benefit to the employees, inasmuch as these sheets in the past have been given to, and monitored by, union officials. Counsel for plaintiffs contend that black employees are entitled to some better system of notification in order that they may take full advantage of their seniority rights.

The court, frankly, was astonished during pretrial conferences that such a system—or lack of a system—could work. During trial, however, it became apparent from the evidence that the company's contentions as to the impossibility of a bidding procedure and as to the lack of utility of public posting of daily assignments were not specious. More importantly it was clear from the testimony that the employees, white and black, found the "word-of-mouth" and "personal observation" approach satisfactory and workable. Critical to this case, it was clear from the evidence that the lack of formal procedures for notification neither discriminated, nor perpetuated the effects of any past discrimination, against blacks. It should be noted in this regard that at Pullman's Bessemer plant the union officials play a far more active role in monitoring and ferreting out violations of employees' seniority rights than this court has found at other plants, and that these union positions are shared rather evenly between blacks and whites.

The court has no doubt but that some better system of giving notification about assignments could be adopted for this plant—though it would have to be different from that found in typical collective bargaining agreements—and that such a system, though the present one meets with general satisfaction,

would be of benefit to the employees, both white and black. However, as indicated earlier in this opinion, the court's role is limited to providing remedies for violations of the anti-discrimination statutes, and otherwise not to interfering with the collective bargaining process. As an issue in this lawsuit, plaintiffs' claim regarding posting of notices and the like is due to be denied, leaving the matter for collective bargaining processes.

V. Discharges of Swint and Humphrey

Louis Swint and Clyde Humphrey, black employees in the Steel Erection department, were fired by Pullman in May 1971 and November 1972, respectively. Disappointed with the outcome of arbitration proceedings,[55] each attacks the company's action as discriminatory or retaliatory, each having filed a charge of racial discrimination with the EEOC[56] prior to discharge and Swint also having been active on the plant's Civil Rights Committee.

In each instance the principal reason assigned by the company for its action was that of insubordination; and, without recounting the extensive evidence here, it is clear that the company had good and ample reason for believing[57] them guilty of such conduct, as well as of other prior derelictions in employment. There can be no doubt but that such action by employees was deemed by the company as a dischargeable offense, whether coming from blacks or from whites; and the only real question is whether these were but labels—were but a subterfuge—to cover the real reasons for their discharges; namely, that they were black or that they had caused problems to the company through filing of EEOC charges or Swint's service on the Civil Rights Committee.[58]

There is not the slightest evidence anywhere in the record on which the court might indulge in the inference that they were

fired because they were black. Perhaps the most telling point is that Swint's insubordination was directed toward a black foreman and that, in Humphrey's case, another black employee, who had been jointly involved in a refusal to do assigned work, was given no punishment when he recanted and agreed to do the work. (Humphrey persisted in refusing to do the work, was therupon discharged, and was reinstated by the arbitrator on the basis there was not enough distinction between the conduct of the two to justify the widely disparate treatment by the company.)

[No Retaliation]

Nor is there substance in the assertion that Pullman's actions were retaliatory for earlier EEOC charges. It does not appear that the persons making the decision to discharge them were even aware of the filing of the charges. These were not the only charges filed with the EEOC—there have been a number of them, virtually all, it may be noted, having been found to be without probable cause. The evidence discloses that a number of those who have made claims of racial discrimination have obtained, if anything, favored treatment thereafter from the company in the form of obtaining promotions, transfers, reassignments, etc., which they had requested. Examples include Henry Vann, Spurgeon Seals, Edgar Davis, Junior Wormley, Willie James Johnson (one of the two named plaintiffs in this case), and William C. Harris. With the sole exception of the claims of Swint and Humphrey, the evidence reveals no instance of an employee filing an EEOC charge or serving on the Civil Rights Committee and thereafter being subjected to any allegedly retaliatory action from the company. In the present case it is unlikely that either Swint or Humphrey would have remained with Pullman as long as they did unless the company had been "bending over backwards" on their behalf. Their claims are denied.

Conclusion

With the limited exception of expanding somewhat eligibility to transfer rights under the 1972 agreement respecting six departments, the various claims and items of relief sought by plaintiffs are due to be denied. While the defendants must be considered as the "prevailing parties", nevertheless, in the exercise of discretion, the court believes that attornes' fees and costs should not be awarded to them. It is quite possible that the presence of this litigation has played some therapeutic role in bringing about the 1972 agreement and the strides made at Pullman in fashioning its affirmative action plans for enhancement of opportunities for black employees. The exposure of employment practices at Pullman through this litigation has not been without some benefit to both the company and the union. In a case where counsel for the plaintiff class has displayed unusual ability, fairness, and industry, it would hardly be in the public interest not only for his firm to go without recompense for considerable time and expenses, but for his clients as well to be taxed with additional charges. Judgment will reflect that each party is to bear his or its own costs and expenses.

Judgment

In accordance with the findings and conclusions contained in the Memorandum of Opinion filed concurrently herewith, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Memorandum of Agreement of May 1972 between the Department of Labor and Pullman-Standard is declared to be binding upon the union defendants; but eligibility under the agreement for transfers from the Janitors, Truck, and Die & Tool (CIO) departments and for transfers to the Plant Protection, Inspection, and Air Brake & Pipe Shop departments shall be modified to include certain classes of employees as more fully specified in the Memorandum of Opinion. Liability, if any, for

back pay in favor of persons benefited by such change in eligibility respecting transfers from the Janitors, Truck, and Die & Tool departments is severed for subsequent proceedings, as may be necessary, in accordance with procedures specified in the Memorandum of Opinion; but there is no just reason for delay as to the other issues in the case and entry of final judgment as to all such other issues is expressly directed.

2. In all other respects the claims of plaintiffs and of the plaintiff class are denied and the action dismissed with prejudice.

3. Each party shall bear its own costs.

Appendix A - Footnotes

[1] The court concluded that the case was maintainable as a class action under Rule 23(b)(2) and that neither constitutional requirements nor Rule 23(c)(2) made individual notice mandatory under the circumstances. Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 9 FEP Cases 1302 (1974).

[2] One of the five issues, that involving posting requirements, was thought resolved in advance of trial, but the plaintiffs, believing that resolution inadequate, chose to present the issue at trial as permitted by the pretrial order.

[3] Orders may be for as few as 25 cars, or for several thousand.

[4] The number of workers in Steelworkers units at the Bessemer plant varies from over 2,800 at peak employment periods to less than 200 at the lowest levels. During 1973, which was not abnormal in this respect, on only three occasions was the employment level in one week approximately equal to that of the prior week. Indeed, a chart based upon monthly employment hours from early 1958 to mid-1974 reflects only a very few times that hours worked in one month have have been aproximately the same as in any of the two months preceding or following. Changes in the work force were occurring during the several weeks this case was tried.

[5] Millrights and certain employees in the Die and Tool Department are represented by the International Association of Machinists and Aerospace Workers, AFL-CIO. For the limited purpose that some of the relief sought by plaintiffs might entail possible modification of its contract with Pullman, the I.A.M. and its Local Lodge 372 were joined as defendants at the time of trial although not previously named in any charges before the EEOC or involved in the allegations of the pleadings in this case. Since the I.A.M. jobs are only indirectly involved in this litigation, such positions are not dealt with or included in the review of evidence or the findings in this opinion unless specifically noted.

[6] While the job classification manual lists some 250 jobs, many of these are not worked at Bessemer, and several of the classifications—particularly, laborer, cleanup, craneman, and hook-on—appear in a number of departments as separate listings. The plaintiffs identified 123 jobs from the June 1973 seniority rosters, but even this figure includes duplications where the same job appears in more than one department.

[7] According to data showing the average number of persons drawing paychecks by department over an 18 month period ending June 1974, over 50% of the employees work in the Welding and Steel Erection Departments and almost 77% work in those departments plus the next four largest (Paint & Shipping Track, Punch & Shear, Steel Construction, and Maintenance).

[8] For example, Cleanup man, JC 1, has the lowest non-incentive standard hourly wage ($3,635 as of October 1973), while Template Maker Craft, JC 20, has the highest such wage (15,399 as of October 1973). Piece-rate scales and production quotas are frequently of great significance in determining the actual earnings potential of a particular job.

[9] There are a score or so of female production and maintenance workers at Pullman, both white and black. Due to the predominance of male employees, however, the masculine gender for pronouns is used for convenience in this opinion.

[10] Actual work-hour figures for 1965 were not available; nor was the June 1, 1965, seniority list. However, by looking at the June 1964 seniority list (PX-2) and by taking account of the additions and deletions to that list representing hires and terminations during the year, it is possible to construct the functional equivalent of, the June 1965 list. This calculation reflects 1,151 blacks and 1,773 whites on the seniority list as of June 1, 1965. While the seniority list does not absolutely reflect actual employment at any particular time, it does bear a significant correlation therewith in a period of high employment, such as June 1965 (in excess of 2,350 average workers for the month, per page 35 of DX-351). It may be noted that the actual employment of blacks in the December 1972-June 1974 period, i.e., 49.5% exceeded slightly the percentage of blacks on the seniority lists for June 1972 and June 1973, i.e., 44% and 46%, respectively.

[11] That the percentage of black workers at Pullman is higher than the percentage of black population or work force in Jefferson County, or even in Bessemer, does not, however, indicate hiring bias in favor of blacks. While data has not been compiled to compare actual applications for employment with hiring at Pullman for the period, one can, by analyzing the seniority rosters from 1966 through 1973, determine that approximately 36% of the new hires during that period were black, a percentage which is compatible with work force and population data from the census. Presumably, the analysis of quits and discharges during 1971 (page 83 of DX 351), showing that during that year almost three times as many whites as blacks either quit or were discharged, would be typical for the entire period. One may speculate that relative job opportunities with other employers were better for whites than for blacks and that relatively more blacks than whites chose to accept recall to Pullman after layoffs.

[12] Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated, and remained so into the mid-60's, not by formal agreement to that effect, but under a custom and practice which the company condoned, if not approved.

[13] For a number of years the labor agreement has contained language requiring its provisions to be applied without discrimination, but prior to the McCoy arbitration decision in March 1965 this language had been without apparent significance.

[14] A temporary promotion results in some increase in compensation and, perhaps more significantly, is the principal avenue by which an employee can obtain recognition as capable of satisfactorily performing the job.

[15] The memorandum contained provisions similar to those later incorporated in the 1972 agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

[16] Over a hundred blacks have received welder training at company expense and become welders at Pullman (though many have since gone with other companies). Without denying the benefits such training has provided to blacks, plaintiffs do note that with respect to welder jobs, the company has instituted a requirement that before it will test a welder's competency the employee must now show either formal training or field experience with some other company. This new requirement, though not unreasonable standing by itself, might constitute a discriminatory practice since in prior years whites were able to get testing with only company experience. This potentially discriminatory requirement, however, is not challenged as one of the issues in this case, and really has nothing to do with such issues, e.g., departmental seniority, assignment of work in the same JC level.

[17] The union has never formally adopted the agreement, but in practice has accepted the terms thereof to the extent that it must be deemed bound thereby.

[18] Employees from the low-ceiling departments, if possessing minimal qualifications, can also obtain vacancies arising in the I.A.M. units. In such event, they take their plant age into such units for the purposes of layoff and recall and, when vying against other apprentices at the same level, for promotional purposes. Without formally concurring in the agreement, the I.A.M. has apparently accepted the provisions and implicitly agreed to be bound thereby.

[19] It was discovered during the trial that one employee so transferring into the Powerhouse department, Robert Johnson, is not credited on the seniority rosters with his plant age for promotional purposes and apparently has never been given his option regarding seniority for layoff and recall purposes. Due, however, to stability of employment in the department and lack of subsequent promotional opportunities in the department, it appears that this mistake has been error without injury.

[20] The class was defined as consisting of all black persons who at any time sebsequent to one year prior to the filing of any charges with the EEOC had been employed by Pullman (at its Bessemer plant) as production or maintenance workers in positions represented by the United Steelworkers. General notification to class members specified these as the issues in the case and stated the class prevailed on one or more of the four issues.

[21] In the pretrial order this issue was defined as subsuming the contentions on behalf of the class that the agreement with the Department of Labor was inadequate in the following respects: the transfer rights applied only to four departments; the agreement did not provide for "red circling"; only a single transfer was provided; and transfers to I.A.M. positions were not afforded. At conferences during the trial of the case it became apparent that plaintiffs also contended that the transfer rights should have been extended to black employees hired in the 1965-68 period, rather than being limited to pre-May 1965 employees. [*Caveat:* The description of the issues in this part of the opinion should be taken merely as defining the contentions and not, for example, as constituting a finding by the court that no provision is in fact made for transfers to the I.A.M. positions under the agreement Cf. fn. 18, supra.]

[22] Mr. Swint's claims are premised on 42 U.S.C.A. §§ 1981, 2000e-2(a)(1), and 2000e-3(a). while Mr. Humphrey's are grounded only upon 42 U.S.C.A. § 1981. The court has assumed *arguendo* without deciding, that Humphrey's claim of retaliation for filing EEOC charges can be posited under §1981 and that Swint's alternative claim of retaliation for his participation on a joint Civil Rights Committee is cognizable.

[23] The Franks case disposes of one contention made by plaintiffs' namely, that the agreement with the Department of Labor was deficient in providing a one-transfer-only. See, 495 F.2d at 417 n. 16, 8 FEP Cases at 69. Actually, the agreement *sub judice* does provide for additional transfer rights under certain conditions.

[24] There is no contention in the present case that the departmental seniority system at Bessemer is applied other than in a uniform manner regardless of race or color. Nor is there evidence that the rather limited number of inter-departmental transfers granted at Pullman have been other than in a fair and non-discriminatory manner.

[25] For example, in Pettway v. ACIPCO, 494 F.2d 211, 7 FEP Cases 1115 (CA5 1974), at the time of trial in 1971 there were some 81% of the black employees (as compared with 54% of the whites) assigned to the seven departments (excluding Personnel and those with under 15 employees) having the lowest average wage, while 37.6% of the whites (as compared with 7% of the blacks) were assigned to the five departments having the highest average wage. More significantly, jobs in those mixed departments had in 1962 been totally segregated (whites holding only the higher paying jobs and blacks only the lower paying ones); and, of the limited integration in jobs which occurred over the

next seven years (over 75% of the job classifications still were segregated in 1969), such was effected through the influx of whites into black jobs, without a "sign of movement of blacks into higher paying jobs". Only 25% of the job classifications were integrated in 1971 when the case was tried.

[36] At Goodyear the departments were totally segregated until 1962. The first assignment of a white employee to the labor department occurred in September 1965. Of the 80 blacks hired in 1965-70, over 40% were assigned to the labor department, while of the 149 whites hired in the same period less than 7% of them were so assigned. It was admitted that labor department jobs were the lowest paying in the plant.

[37] A ranking according to job class levels does not mean that each employee would so rank the departments in terms of desirability; but it does provide a rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job classworked. For the Welding department the court has disregarded the highest job, Welder-Craft (JC 16), using instead the next highest job class, this adjustment being made because the highest position offers such few opportunities considering the size of the department, i.e., less than 1% of the department jobs. This study is based upon seniority rosters in the absence of data showing actual distribution of the work force by departments; and the June 1, 1965, figures are derived from PX-2. See footnote 10, supra. Percentage column I is computed for all departments. For the purposes indicated in the test of the opinion, percentage column II disregards employees for the nine departments involved in the agreement with the Department of Labor and percentage. Column III further disregards the maintenance and Welding departments. (In analyzing the evidence the court constructed charts of the same format based upon the June 1973 seniority rosters and upon the December 1973-June 1974 average monthly employment data. While these charts are not reproduced in this opinion, some references are made to the results of such studies.)

[38] It should be noted that, absent a conscious effort to achieve racial balance in departments, the existence of disproportionate racial compositions in departments is to be expected. Even when the extent of variation from the mean is great, other factors—such as quit rates, composition of application group at time of hire, applicant preference for employment in departments where other family members or friends are assigned, etc.—must be considered before concluding that racial motivations were involved in making the assignments.

[29] The matter of personal choice cannot be wholly discounted when evaluating departmental statistics. It is clear from the evidence that the blacks in the Janitors department prefer it to most — and a few of them prefer it to all—departments. The actual earnings of employees in the Janitors department indicate that, due to greater stability of employment, it may indeed have greater earnings potential than employment in a number of other departments with higher JC positions.

[30] Actually, even if there were a demonstration of segregation in job classifications, this would have no causal connection with the departmental seniority system, but would be indicative of some other discriminatory practice. Presumably, these studies were offered by plaintiffs as circumstantial evidence of motive, intent, design, etc., on the issue of departmental seniority and the other issues in this case.

[31] While there is a dramatic improvement in the status of blacks between PX-61 and PX-55, showing job classes of persons by race on seniority rosters for 1964 and 1973, respectively, yet the time lag inherent in "rightful place" adjustments still leaves much room for further movement upward by blacks. For example, the 1973 study by plaintiffs showed that 19.9% of the whites held positions on the rosters above JC 10, as compared with only 12.2% of the blacks. As an illustration of the difficulty of using seniority rosters to evaluate job classifications, it may be noted that for May 8, 1973, the only date for which such information has been presented (DX-274), 10,8% of the whites (and 9.3% of the blacks) actually working on that date in non-craft jobs were in jobs above JC 10.

[32] From January 1969 to May 1972, there was confusion since the 1969 memorandum of understanding, for lack of union acceptance, never became effective. One of plaintiff's witnesses, Alfonso Cole, implied that he was deceived by the Contract Compliance Officers as to his rights under the May 1972 agreements; but the court, having heard all of them, is persuaded that any misunderstanding by Cole is the result of distortion on the receiving, rather than on the sending, end of such communication.

[33] It is possible, though unlikely, that one or more of the blacks not being added to the "affected class" provision would have a claim for back pay based on their not having previously been included in that provision. Questions of back pay were previously severed for subsequent trial as might be necessary. The defendants are directed to give immediate written notice to such persons of their possible entitlement to back pay; and they shall have thirty days from receipt of such

notice (or one year if personal notification cannot be effected) in which to file with the court a claim for such relief. Plaintiffs' counsel may represent such persons unless they choose to employ their own attorneys. Under the provisions of Rule 54(b) the court determines that there is not just reason for delay of the other issues in the case pending resolution of such back pay claims, if any, and expressly directs entry of judgments as to all issues excluding that relating to back pay for such persons.

[14] It is clear that the persons now being added to the "transfer in" groups under the agreeement have no claim for back-pay since the vacancies in the three departments to this point would not have been sufficient to give them, at the bottom of the eligible group, any tranfer rights. Accordingly, any claim for back pay on their behalf is denied.

[15] This assumes, of course, that the work asigned is within the normal range of duties of the position. Occasionally, there will be a claim that certain work has been assigned which is outside the scope of duties and in that event grievances under the contract can be, and have been, pursued. Plaintiffs' contentions in this case are directed to assignments of work which, but for asserted racial implications, would be within management's rights. It may be noted that the provision in the collective bargaining agreement prohibiting discriminatory application of its terms would probably be an overriding limitation on management's rights and be the basis for a grievance under the contract where racial discrimination were involved in the exercise of such powers. Such a possibility does not, of course, preclude an action under Title VII for the same conduct.

[16] Certain assignments in the Punch & Shear department may, due to differing piecerates, have some monetary conequences. Plaintiffs have candidly acknowledged, however, that such results are only of collateral signifcance and not at the core of their complaint.

[17] In view of the court's conclusions as to the claim it is unnecessary to determine an appropriate remedy. Defendant company notes that any compensatory relief would not be "back pay" but rather an award comparable to general compensatory damages for mental suffering, presumably a matter for jury determination. See Curtis v. Loether, ____ U.S. ____ (1974); Lynch v. Pan American World Airways, 475 F.2d 764, 6 FEP Cases 353 (CA5 1973).

" The tendered circumstantial evidence regarding prejudice by foreman is mixed and quite inconclusive. A few black witnesses gave accounts of having been subjected to purportedly abusive language, or the like, from a white foreman; but the paucity of such complaints in comparison to the astronomical number of possibilities over the years, together with the near-paranoiac, exaggerated descriptions by those who did have such complaints, leads the court to place little weight on such evidence. A review of the more than 2,800 grievances filed by white and black employees in the past eight years is hardly supportive of any inference as to discrimination against blacks. The picture is rather that of typical disputes between employees and their employer, with only a very few having even marginal racial overtones. While a greater percentage of blacks than whites have been discharged over the years, a study of the grievances related thereto indicates no unequal treatment by the company. From the testimony of witnesses, the court is convinced that, by and large, white foremen in the past several years when dealing with black workers (and, likewise, black foremen when dealing with white workers) have tended to "lean over backwards" to avoid possible criticism as to discrimination. Over 54% of the temporary promotions to bargaining unit jobs made by foremen in the December 1972 to June 1974 period were to black employees.

" "How many legs does a dog have if you call a tail a 'leg'?" "Only four," goes the epigram, "because what you call it doesn't change what it is." The wisdom so expressed is illustrated by one example—and there are others — from the evidence in the case *sub judice*. Edward Loftin testified that all—or, at the very least, almost all—of the many grievances he had filed against Pullman involved racial discrimination. The grievances—over fifteen of them—were then examined one by one. Not one appeared to have any substantial element of *racial* discrimination. A characteristic grievance was that some other black employee had received an assignment that by seniority Loftin claimed he should have gotten. As to one grievance, Loftin also filed a charge with the EEOC—it involved a 30 day suspension for refusing to obey the orders of his black foreman, and the principal complaint apparently was that he was not adequatley represented by his union since only two union officials were present during one of the grievance steps.

" The company's business necessity defense is persuasive on this claim; that is, if assignments were to be a matter of daily choice. It is not persuasive, however, as to more infrequent opportunities for individual selection, such as to the beginning of a substantial order. While there no doubt would be selections by an employee of work he

could not perform satisfactorily, this could be largely remedied, albeit with increased inconvenience and expense of additional grievances, by use of the "ability" factor in the seniority definition. The failure of the "business necessity" defense does not, of course, mean the establishment of a cause of action.

[41] The court is not so naive as to believe that in no instance has there ever been racial prejudice in an assignment by a foreman. No doubt there has been. But the court concludes that this would have been far from commonplace and uncharacteristic of the conditions of employment at Bessemer. Isolated acts of prejudice, particularly where deemed to exist more by assumptions as to human nature than by direct proof, would not justify the issuance of injunctive relief.

[42] Of course, the company would not want to expose itself to back-pay liability respecting such sign-ups. Its defense—that it was not at fault and, to the extent of its bargaining power, had attempted to eliminate the practice—very possibly would be successful in passing to the union ultimate liability for such back pay. See Guerra v. Manchester Terminal Corp., 498 F.2d 641, 8 FEP Cases 433 (CA5 1974).

[43] The plaintiffs' request that sub-assembly work should be awarded on the basis of plant age (rather than departmental age) must also be denied for lack of prior discrimination in assigning personnel to the Welding department.

[44] Instituted at a time when, due to job segregation, there were only white welders, the sub-assembly sign-up would only have had the effect of determining which whites would get the sub-assembly work andwhich would not. Prior direct discrimination can sometimes be determinative of lack of racial motivation as to other acts. See Taylor v. McKeithen, ____ F.2d ____ (CA5, Aug. 21, 1974; slip op. at pp. 7085-86).

[45] Plaintiffs also assert that black foremen generally are given responsibility only over predominantly black crews. In a sense this is true, for most of the black foremen are located in departments which are predominantly black. This, however, is a natural consequence of a system, such as at Pullman, where most of the foremen come up "through the ranks" of their departments rather than being hired from the outside; and, indeed, a relatively higher proportion of white foremen generally is found in those departments where there is a relatively higher percentage of which employees. The plaintiffs, for obvious reasons do not want a change in the basic in-plant approach to supervisory promotions. Moreover, it is clear that black foremen do exercise supervision over white employees and that at least two normally have supervision over predominantly white crews.

[46] Plaintiffs' attack is upon Pullman's practices regarding promotions of production and maintenance employees to foremen positions not upon its relatively few "outside" hires of managerial personnel. It should be noted that the Plant Manager at Bessemer is one who came up through the ranks.

[47] The employee continues to accumulate seniority in his departmental bargaining unit for two years after promotion to a supervisory position.

[48] This conclusion is reached upon a consideration of census information introduced, of evidence concerning particular employees, and of an analysis of Bessemer employment records conducted by defendant's outside statistician. According to the latter study, 13.3% of Pullman's black employees who had been hired before 1965 were functionally illiterate (as compared to 2.4% of the whites in such category). The court is not holding—nor has the company really contended—that some particular level of education could pass muster as a requirement for promotions to supervisory positions; but it is obvious from other evidence in the case that the lack of minimal education frequently would render such persons unable to perform their required duties and hence make them less likely candidates for such positions.

[49] Testimony revealed many instances of such turn-downs. According to company records, 30 blacks and 17 whites have refused appointments as hourly foremen since the mid-60's, while according to the statistician's study of the 1971-73 period 58.3% of the refusals of such promotions were by blacks. There are many reasons why an employee, white or black, might choose to reject a temporary promotion to foreman; but it is clear from the evidence that an additional problem for blacks considering acceptance of such positions (at least until the past couple of years) was the likelihood of derision as an "Uncle Tom" by some black co-workers.

[50] Basically, these situations involved disgruntlement when other black employees were picked for such promotions ahead of, or instead of, the witness. Alvester Braxton was not selected, according to his foreman, due to excessive absenteeism (shown to the court), lack of initiative in learning other jobs in the department, and an inability to accept responsibility due to a nervous condition. In Braxton's department other blacks have been made hourly foremen, and one a salaried forman. Another, Spurgeon Seals, was turned down because he didn't get along with the other men; and here also in the Paint department,

other blacks have been made foremen before and after the rejection of Seals. Another, a man named Wilson in the Punch & Shear department, was, subsequent to this first request, later made a foreman. The evidence has not shown a single example of a black indicating an interest in a foreman's job being passed over in favor of a white with less qualifications.

[11] If this were the policy—and the company asserts it has no such limitation on promotions of blacks—it would be above that requested as relief by the plaintiffs. In the particular department where this is reported to have been said, five of the last six permanent supervisory promotions have been of black employees.

[12] The selection procedure at Bessemer is not totally subjective. The company is committed under the agreement with the department of Labor to attempting to appoint as temporary foremen no smaller a percentage of blacks than the percentage of black employees in a given department. Moreover, selection of salaried foremen is based upon demonstrated abilities while serving as hourly foremen, and hence is an experientially-based decision, albeit by a presently all-white group.

[13] Actually, one black (a Contract Compliance Officer) at the present time makes significant input to the decision-making process. With blacks starting to move further up the supervisory ladder, in the not distant future the decisions on supervisory positions will likely cease being an all-white function.

[14] The only suggested alternative in the evidence, that by one of plaintiffs' witnesses, was that seniority should be followed in making appointments of foremen. An objective standard to be sure, but hardly an apt one.

[15] Swint's discharge was upheld by the arbitrator; Humphrey's resulted in reinstatement without back pay. Pullman raises two special defenses to Humphrey's claim in this case related to the arbitration proceedings; (1) that his claim here is time barred since, in view of Alexander v. Gardner-Denver Co., 415 U.S. 915, 7 FEP Cases 81 (1974) (allowing pursuit of statutory remedies independent of the grievance machinery), the period during which contractual remedies were being processed should not toll the statute of limitations; and (2) that, having accepted benefits under the arbitrator's award, he should not be allowed "a second bite at the apple". In support of the first point, Pullman cites Guy v. Robbins & Myers Inc., 8 FEP Cases 311 (W.D. Tenn., June 12, 1974; but this court concludes that the Fifth Circuit still approves the tolling concept, as evidenced analogously by its recent decision in Guerra v. Manchester Terminal Corp., 498 F.2d 641, 8 FEP Cases 433 (CA5 No. 73-1907, July 31, 1974). As to the second point, this court concludes there is no basis here for applying a doctrine of waiver of estoppel (since Humphrey is seeking backpay, which was not awarded in the arbitration decision) and that, indeed, Humphrey is not attempting to reap "any windfall or unjust enrichment from the overlapping remedies" under the statutes and the collective bargaining agreement. Cf. Guerra v. Manchester Terminal Corp., supra, slip opinion at p. 6470; footnote 14 in Alexander v. Garner-Denver Co., supra.

[16] In neither case did the EEOC find "probable cause."

[17] The court need not actually decide whether they in fact were guilty of insubordination; it is suficient for the company's defense if management with good reason thought they were so guilty and discharged them for that reason. As a matter of fact, this court—as did the arbitrators—would find they were guilty of insubordination.

[18] There is a suggestion that the real reason for the company's discharge of Swint was its suspicion that Swint had instigated a work-stoppage by others. Even if this were true and would not have been sustainable by evidence in the arbitration proceeding, such would not constitute a Title VII violation. See Balderas v. LaCasita Farms, 500 F.2d 195, 8 FEP Cases 686 (CA5, Aug. 30, 1974).

APPENDIX B

Swint v. Pullman-Standard

Louis Swint et al., Plaintiffs-Appellants,

v.

Pullman-Standard et al.,
Defendants-Appellees,

Clyde Humphrey, Intervenor.

No. 74-3726.

United States Court of Appeals,

Fifth Circuit.

Aug. 30, 1976.

In an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, employees contended that continuation of departmental seniority by the employer perpetuated the effects of past discrimination. The United States District Court for the Northern District of Alabama, at Birmingham, Sam C. Pointer, Jr., J., held that the steps taken by the employer constituted compliance with Title VII, and plaintiff appealed. The Court of Appeals, Clark, Circuit Judge, held, inter alia, that the District Court's result was based on a prima facie case and other burden of proof concepts which did not fit the case at hand.

Affirmed in part, part vacated and remanded.

1. Civil Rights key **45**

While trial court in employment race discrimination action under Civil Rights Act of 1964 was not clearly erroneous in its

---

[1]All footnotes for this section appear at the end of this Appendix, pp. A-85-A-99.

use of statistical chart in determining that black employees were not disproportionately assigned to less desirable departments at railroad car manufacturing plant, employees' valid attacks on structure of chart impugned credibility of court's ultimate conclusions based on departmental desirability. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights key 43

Plaintiff in employment discrimination action brought under Title VII of Civil Rights Act of 1964 does not have to show economic loss to prove discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights key 44(1)

At least for purposes of injunctive relief, plaintiffs in employment discrimination action were not required to show that they were assigned discriminatorily to less desirable departments in order to prove prima facie case of racial discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights key 44(1)

If back pay is sought in employment discrimination action under Civil Rights Act of 1963 and if defendants have convincingly brought into question the class' entitlement to it, economic harm must be shown and, where discrimination in departmental assignment is alleged, showing of departmental desirability would therefore be relevant to establish such prima facie case. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights key 44(1)

Showing in suit alleging racial discrimination in employment, that departments to which blacks have disproportionately been

assigned are less desirable departments, is probative of racial discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights key 44(1)

In determining whether prima facie case has been proven in class action alleging racial discrimination in employment, question should be whether class has established history of broad patterns of plantwide racially discriminatory departmental assignment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

* * *

29. Civil Rights key 43

Trial court in employemnt discrimination action acted improperly in considering, as indicative of nondiscrimination by employer in selection of supervisory personnel, evidence that due to former segregation of jobs it had taken blacks some time to learn range of job skills necessary to perform such supervisory duties; before such justification could be considered, employer would have to prove that unpromoted blacks did in fact lack necessary skills; that needed skills were justified by business necessity; and, if employees could show that failure to gain such skills was result of neutral policy which perpetuated past discrimination, employer would have to show that policy was justified by business necessity. Civil Rights Act of 1963, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

30. Civil Rights key 44(4)

Trial court in employment discrimination action erred in finding that plaintiffs' statistics did not constitute proof of racially discriminatory promotion to supervisory positions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

31. Civil Rights key 9.10

Use of subjective promotion criteria by mostly white formen is ready mechanism for racial discrimination in promotions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

32. Courts key 406.3(13)

Trial court in employment discrimination action was not clearly erroneous in concluding, on basis of only subjective opinion evidence, that plaintiffs had failed to prove that blacks were assigned to less desirable tasks within each job class in employer's welding department. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

33. Courts key 406.3(13)

Trial court's conclusion in employment discrimination action that individual plaintiffs were not discharged for racial reasons, but for insubordination, was not clearly erroneous. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

34. Courts key 405(14.14)

In employment discrimination action brought under Title VII of Civil Rights Act of 1964, in view of notice of appeal, employer's attempt to limit issues on appeal solely to those presented by single employee in his individual capacity were without merit. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

U. W. Clemon, Birmingham, Ala., Marilyn Holifield, New York City, for plaintiffs-appellants.

John C. Falkenberry, Birmingham, Ala., Michael H. Gottesman, Washington, D. C., for U. S. Steelworkers, and others.

C. V. Stelzenmuller, Birmingham, Ala., Franklin B. Snyder, Chicago, Ill., for Pullman-Standard Inc.

Appeal from the United States District Court for The Northern District of Alabama.

Before COLEMAN, CLARK and GEE, Circuit Judges.

CLARK, Circuit Judge:

This Title VII case raises claims that the very substantial, good faith efforts of the employer and union working together to end racially segregated working practices still fall short of eliminating the present effects of past discrimination for many black workers. The central attack is on a continuation of departmental seniority. The district court after a full hearing prepared a detailed memorandum opinion reasoning that the steps taken constituted sufficient complaince with Title VII. Principally because that result was based on a prima facie case and other burden of proof concepts which did not fit this case, we vacate the judgment appealed from and reverse for further proceedings, including reconsideration of appropriate backpay and other relief.

I. FACTS[1]

Pullman-Standard, a division of Pullman, Inc., is the world's largest manufacturer of railway freight cars and parts. Operations at its Bessemer, Alabama plant are geared to special orders, rather than the production of an inventory, and accordingly are conducted much like a custom steel fabricating shop, though on a larger scale.[2] This method of production, coupled with sporadic market demands from the railroad industry, results in frequent and dramatic fluctuations in the level of employment.[3] Since the early 1940's, most[4] of the production and maintenance workers at Pullman-Standard's Bessemer

plant have been represented by the United Steelworkers, which also hold representation status at Pullman-Standard's other three plants; and key provisions dealing with seniority rights are largely covered by local rules at the individual plants rather than by the company-wide triennial collective bargaining contracts.

The production and maintenance jobs at Pullman-Standard, over a hundred in number,[5], are divided among 25 different United Steelworkers departments of varying sizes.[6] In addition to these departments there are two Machinist Union departments and an additional United Steelworkers department having only one employee. All assignments to departments are made by Pullman-Standard. Each job has a specified job class (JC) level, which determines its relative ranking in base pay in comparison to other jobs.[7] All but two departments, Janitors and Template, have more than one job classification; and most, but not all, classifications will be worked by more than a single employee during peak employment periods. One such job (Welder) sometimes is worked by over 500 employees.

Under the local rules at Pullman-Standard, seniority is measured by continuous service in a particular department and is exercised in competition with all other employees in that department, there being no lines of promotion or progression in any department. Seniority rosters are maintained by department; and departmental age is basically the sole criterion used to determine who is rolled back or laid-off in the event of reductions, and who is recalled or promoted (assuming ability to do the work) in the event of force increases or other vacancies, in the department. It is somewhat inappropriate to talk about "permanent jobs" at Pullman-Standard, except perhaps with respect to the most senior employees in the department; for the constant fluctuations in job requirements and employment levels cause frequent movement of employees from one job to another. While the seniority rosters do indicate a job

classificaton for each employee, these designations do not reflect his[9] permanent job, but rather constitute a recognition by the company that the employee has satisfactorily performed the job and is thereby protected under the collective bargaining agreement against rejection in favor of a junior employee on the factor of relative ability. The rosters are updated annually as of June 1st; and frequently only the highest job class which an employee has satisfactorily performed is shown for him.

From the study of payroll information for the 18-month period ending June 1974, it appears that 49.5% of the work force is black, a ratio which is comparable to that which existed in June 1965.[9] Understandably, plaintiffs, do not assert that Pullman's initial hiring policies, as such, are now or ever have been racially discriminatory.[10] Plaintiffs do, however, contend that assignment of new hires to the several departments was discriminatory, and continued so for several years following the passage of Title VII. Further, the plaintiffs contend that prior to June 1965 a number of the better jobs, including supervisory positions, were "white only" and a number of the lower-paying jobs were "black only." Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated, and remained so into the mid-60's, not by formal agreement to that effect, but under a custom and practice which the company condoned, if not approved.

In early 1965, spurred by an arbitration decision which opened up the then all-white Rivet Driver Job to blacks,[11] the company began implementing a program to eliminate barriers to advancement by blacks and, in general, to conform to the impending requirements of Title VII where possible infractions were detected. Black buckers and welder helpers were given trials to ascertain their abilities as rivet drivers and welders, respectively.

Beginning in June 1965 black employees were appointed as hourly foremen. A reporting system of hires and promotions was undertaken, as were efforts to recruit blacks for the more highly skilled positions. In early 1966, an agreement was made with the union to utilize seniority in the filling of temporary vacancies.[12] Negotiations were commenced in 1968 with the Department of Labor, Office of Federal Contract Compliance (OFCC), which led in January 1969 to a conditional memorandum of understanding (OFCC agreement) designed to enhance opportunities for blacks.[13] Although this memorandum never became fully effective due to lack of union acceptance, Pullman-Standard through its Contract Compliance Officers—one black and one white—began encouraging black employees in certain "low ceiling" departments to transfer to other departments and monitoring the filling of temporary vacancies to assure a fair allotment to black employees. Black employees and their families were encouraged to participate in vocational education at the company's expense, a program that has been particularly significant in the training of black welders.[14]

In May 1972, Pullman-Standard entered into an agreement with the Department of Labor to serve as a corrective action program and to bring its employment prctices into compliance with Executive Order 11246 as amended.[15] Of the many provisions in the 25-page OFCC agreement, the most significant to the issues in this case are those relating to interdepartmental transfers. Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments (Template, Powerhouse, Airbrake Pipe Shop, Inspection, and Plant Protection); and those hired before April 30, 1965, who had been assigned to four "low ceiling" departments (Janitor, Die & Tool, Truck and Steel Miscellaneous) are given preference for vacancies arising in any of the departments.[16] These transfer

rights are without limit as to time; and, when exercised, the employee vies for promotions in the new department using his total plant age. For layoff and recall purposes, the employee is given at the time of the transfer the option either to take his plant age into the new department or to keep accruing seniority in his old department while building new age for such purposes in the new department. Retreat rights to the employee's prior job are provided should he fail to qualify for at least a JC 4 job or is disqualified for a promotion in the new department; and in such event the employee may have the right to go to another department rather than return to his original one.

The trial court had before it for determination four claims of class discrimination[17] and claims of individual discrimination by two employees. The class issues were:

> (1) Does the system of departmental seniority, even with the changes made under the OFCC agreement, perpetuate the effects of past discrimination in the assignment of black employees among the various departments?[18]
>
> (2) Has there been discrimination in the assignment of work to persons having the same job title or in the assignment of jobs having the same JC level to the persons entitled to jobs of such JC level?
>
> (3) Has there been discrimination in the promotion of persons to supervisory positions?
>
> (4) Has there been discrimination in the failure to post publicly a list of changes in assignments?

One of the named plaintiffs, Louis Swint, and an intervenor-plaintiff, Clyde Humphrey, each claim that their discharges by the company in May 1971 and November 1972, respectively, were racially motivated or were in retaliation for their having earlier filed charges with the EEOC.[19]

II. DEPARTMENTAL SENIORITY

The district court upheld the use of departmental seniority at Pullman-Standard on the premise that this practice may only be found to have perpetuated the effects of past discrimination when there has been a showing of prior discrimination in the assignment of black employees among departments by exclusively or disproportionately assigning white hires to higher-paying departments and black hires to lower-paying ones. This general principle, though correct in the abstract, cannot be translated into an absolute requirement that a plaintiff prove economic harm before he has established a prima facie case of racial discrimination in hiring assignments. Because the effect of the district court's approach improperly placed that burden on plaintiffs in this action, it found no unremedied discriminatory hiring assignments. Its conclusion based on the assumption that the plaintiffs had not shown that they were assigned to less desirable departments must be reversed and the issue remanded to the district court for reconsideration and resolution in a manner not inconsistent with this opinion.[20]

The lower court concluded that: "With the exception of nine departments, the evidence does not indicate any past or present policy of racially discriminatory assignments." This conclusion primarily rested upon the district court's finding that although in 1965 only five departments had racial compositions approximately equal to the ratio for the total of all departments, "there was no pattern of favoritism to whites in the departmental assignments." At the heart of this finding is a chart constructed by the lower court which ranked each department according to job class range.[21] The chart reveals that a greater percentage of blacks than of whites were employed in 1965 in departments with higher job class ranges. Because the chart is crucial to the district court's approval of departmental seniority, we must carefully and completely analyze the attacks made on it by plaintiff.

A. Was the Chart Wrong?—The Clearly Erroneous Attack

Plaintiffs contend that the theory and use of the chart give an incomplete and misleading impression and that fact findings based on it are clearly erroneous. The chart is designed to show departmental desirability. It accumulates the percentages of blacks and whites in each department in three ways. Column I shows all Steelworker departments except Boilerhouse, Column II additionally excludes the nine departments affected by the OFCC agreement, Column III further takes away the maintenance and welding departments. The accuracy of such an accumulating percentage chart directly depends upon the accuracy of the departmental rankings. Plaintiffs argue that the ranking of departments in the chart is arbitrary and inaccurate for the following five reasons:

1) Departments were ranked by job class range.[22] Plaintiffs argue that the key factor, economic desirability, is much more a function of the number of employees who work in each job class than of a department's job class range. For example, the chart would rank a department with job class ranges 1-10 above a department with ranges 1-9; yet, a department with 100 workers in JC-1 and five workers in JC-10 is clearly not as desirable as a department with five workers in JC-1 and 100 in JC-9. Plaintiffs' propose that any charting of desirability should rank departments by median job classes.[23] Not surprisingly, plaintiffs' proposed charting shows that blacks were disproportionately assigned to less desirable departments. Pullman-Standard replies that medians are also inaccurate indicia unless substantiated by various statistical techniques (such as standard deviations) which have not been supplied in this instance.

2) The plaintiffs contend the court arbitrarily excluded higher, sparsely populated job classes in some departments. The

Welding Department has a JC-16 job class which has less than 1% of the department's employees; therefore, the court excluded JC-16 from the Welding Department's job class range. If the JC-16 job class were included in the Welding Department job class range, the department would rise from rank 16 to rank 4 on the chart. Since Welding is the largest department and one in which whites are disproportionately represented, the accumulated percentages would be changed significantly by this move. Plaintiffs argue that the Wood-Mill, Wood-Erection, Paint, and Steel Construction departments all have less than 1% of their employees working in the top job class; however, the 1% job classes are included in those departments' ranges. The last three departments are particularly important because they are disproportionately black departments which by across-the-board equal treatment would be shown to be less desirable than presently reflected by the chart. Pullman-Standard, however, logically argues that the special statistical treatment given the Welding Department is entirely justified because the JC-10 to JC-16 jump (from the highest job class listed to the unlisted 1% job class) is much greater than the jump in the four departments where 1% job classes were included. Also, Pullman-Standard contends Welding is by far the largest department and deserved the special consideration given by the court's Column III to ensure that it did not unfairly skew the chart.

3) Plaintiffs object to the exclusion from the chart of the Die & Tool IAM, Maintenance IAM, and Boilerhouse departments. Two of these departments are covered by the Machinists instead of the Steelworkers Union. Therefore, they do not have job class ranges and could not easily be assigned ranks on the chart. However, no attempt at even estimating relative rank was made by the court. Boilerhouse is a Steelworker's department whose only worker has always been a JC-10 white employee. Plaintiffs argue that these departments are mostly segregated and are higher paying; therefore, their exclusion directly affects the chart and the conclusions drawn from it.

4) Plaintiffs point to departments which have the same job class ranges. These departments are arbitrarily assigned a rank on the chart even though they are nominally equal. The most obvious example is right in the middle of the rankings where five departments with ranges of JC-1 to JC-11 are listed in order. These ar large departments which total 1/3 of all workers. Two of these departments are heavily black. One contains more blacks than any other department. The ranking of these departments among the five could affect conclusions drawn from the chart.

5) Plaintiffs assail the chart's accumulating percentage columns. Plaintiffs are especially concerned with Column III which provides the strongest support for the court's findings. The exclusion of Welding[24] and Maintenance was made because of special technical skills needed in some of the job classes in these two departments. But, nowhere in the opinion is there the kind of business necessity finding which would be essential to allow a special-needed-skill exclusion to keep these departments from being considered.[25] Also, there is no finding of the nature of these needed skills nor whether they are necessary only in the higher job classes. Finally, if the skills are only needed in the higher job classes, there is no finding as to whether they could be gained while working in the lower ones, either with or without additional special training.[26] The court also found that plaintiffs had failed to prove that blacks were qualified to enter either department. This, however, reflects an incorrect placement of the burden of proof. The question of absence of qualifications is relevant, but only *after* the determination that a pattern of discrimination has been shown; and then, the burden is on the defendant to show the absence of qualifications.[27]

Prior to the desegregation of the Welder job class in this department, whites were able to take a test (usually after having served as a welder's helper and learning the skill) without either

prior formal training or experience to determine whether the employee was qualified to be a welder. Since blacks have been allowed to become welders, the company has required that only those persons with either prior experience or formal training could take the qualifying test. Plaintiffs argued that this should be considered as a facially neutral requirement which in reality operates to perpetuate past discrimination. Since there is some question as to whether this final issue was squarely presented below and since its resolution would not control our decision, we pretermit its resolution.

[1] The concept of plaintiffs' attack on the district court's conclusion that blacks were not disproportionately assigned to less desirable departments based on the chart's deficiencies is framed in terms of a clearly erroneous factual determination. It fails because the district court did not treat the chart as plaintiffs contend. The court made two factual findings relevant to this inquiry. First, the court found that the *chart shows* that blacks were not disproportionately assigned to less desirable departments. This factual finding is correct to a mathematical certainty. Second, the lower court found that the chart was a "rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job class worked." In other words, the district court recognized that the chart had problems. Its "rough index" conclusion also is not clearly erroneous. The reason plaintiffs' clearly erroneous attack miscarries is that they misread the court's ultimate legal conclusion as resting upon a factual finding that the chart was both accurate and not arbitrary.

Despite our holding that the district court did not make an erroneous factfinding in its direct references to the chart, it is clear that plaintiffs valid attacks on the structure of the chart as discussed in detail above do impugn the credibility of the court's ultimate conclusions based on departmental desirability.

B. Less Desirable Assignments—Prima Facie Case

[2] Plaintiffs in successful Title VII cases have uniformly been able to establish that their assignments produced diminished wages.[21] When today's proof was ruled insufficient to demonstrate loss, a novel question was squarely presented. To resolve it requires resort to the statutory language and case analysis of legislative purpose. When this path of reasoning is followed it leads to the conclusion that a Title VII plaintiff does not have to show economic loss to prove discrimination.

The district court concluded that plaintiffs' failure to show that class-wide economic harm resulted from the departmental assignments made meant that no prima facie case had been established. This legal deduction is inconsonant with the Act and its interpretative cases. The Title VII gravamen of the complaint is that departmental seniority perpetuated past discrimination. The key for this case is whether there was past discrimination, *i.e.*, that Pullman-Standard discriminated on the basis of race in making assignments to departments. Going further and requiring plaintiffs to prove that past assignment practices produced lower pay checks is contrary to law and precedent. The district court relied on *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) and *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) for its conclusion that economic harm from departmental assignments must be part of plaintiffs' prima facie proof. This reliance is misplaced. These cases and our contemporary decision in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) are cases in which the plaintiffs had clearly demonstrated that the defendants had assigned them to lower paying positions. When we recognized that the proof of such lower pay confirmed the existence of proscribed discrimination we did not mandate this element as a part of the prima facie case proof every Title VII plaintiff must make.

Title VII contains neither requirement nor implication that economic harm must be shown before a class can be found to have made out a prima facie case of racially discriminatory job assignment. Indeed, the statutory prohibitions of the enactment are explicitly broader than economic harm.

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) and (2).

In the seminal departmental seniority case, *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va.1968), the court made the general observation that employees in the predominately black department were usually paid less than employees in the two predominately white departments. However, a comparison of the wage ranges in all three departments showed one white department offered more and one less pay than the predominately black department.[29]

Notwithstanding this wage range proof and the fact that *Quarles* was specifically requesting a transfer to a department with a lower range than the department in which he worked, the court found that past discriminatory departmental assignment

practices were perpetuated by departmental seniority. While *Quarles* does not explicitly hold that a prima facie case was made without showing economic harm, it necessarily ruled that prima facie case was proven even though wage or job class range showed the predominately black department was not the least desirable.

In *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) the appeals court reversed the trial court's refusal to find that a Title VII violation had been established. The district court had placed on plaintiffs the burden of proving that the Labor Department was the least desirable department, then held that the burden had not been met by proof which showed racially disproportionate assignments of blacks to the Labor Department despite the fact that many jobs in that department paid less than jobs in most of the plant's predominately white departments. The Eighth Circuit reversed this burden placement. In a footnote it declared that where departmental desirability might be relevant defendants must carry the burden of showing blacks had been assigned to a more or an equally desirable department. Speaking more broadly, the court relied on our decision in *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972) (Hayes II) to hold that it was more important for the court to assure discriminatorily assigned employees had the opportunity to bid for jobs denied them because of race than to determine subjective factors of departmental desirability. Although the appeals court's principal determination was that the subjective evidence relied on did not establish the department to be the plant's most desirable place to work, its opinion leaves no doubt that departmental desirability is not an essential part of a plaintiffs' prima facie proof in a case such as this.

In *Hayes II* this court reviewed a lower court's determination that a departmental transfer system cured all possible perpetuation of past discrimination. The plaintiff United States unques-

tionably had established a prima facie case of racially discriminatory departmental assignment and as part of that proof had shown general economic harm to the affected class. However, one substantial issue in *Hayes II* concerned the defendant's contention that justification for not including several departments in the group of departments affected class members could transfer into could be found in the fact that the wages in those departments were "generally lower" than the departments in which affected class members were presently employed. The court ordered that qualified blacks be given an opportunity to transfer into these economically less desirable departments because "the Civil Rights Act provides for a job notwithstanding its lower pay or other disadvantages." *Hayes II*, 456 F.2d at 118.

In *Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721, 723 (8th Cir. 1973), the Eighth Circuit concluded simply that "statistics which show segregated departments and job classifications establish a violation of Title VII." Absent a single statement regarding either objective or subjective economic desirability the court found a Title VII violation. The court expressed concern because the blacks had suffered "the indignities of segregation" and ordered complete relief including transfer rights and departmental merger. *Id* at 726. This case clearly indicates that economic harm is not a necessary element of a prima facie case.

The same district judge in *United States* v. *United States Steel*, 371 F.Supp. 1045 (N.D.Ala.1973), after finding that a prima facie case of racial discrimination had been made, presumed damages to a particular subclass for purposes of injunctive relief.[9] The judge then denied back pay in *U.S. Steel* because plaintiffs had not proven harm caused by discrimination.

The focus of our appellate reversal of this latter burden assignment in *U.S. Steel* was not on whether sufficient evidence

had been presented to establish a prima facie case of discrimination nor on the presumed damages for injunctive relief, but rather focused on the erroneous assignment to plaintiffs of the burden of presenting evidence sufficient to justify a backpay award to the class.

The backpay issue must of course face the causal relation between discrimination and proof of economic harm. We make reference to this prior action not only because of its presumption of damage from racially skewed assignments, but also because it held that economic harm was not even a required part of a backpay prima facie case unless the *defendant* had convincingly brought the issue into question.

A holding that plaintiffs here may be entitled to relief absent showing harm to their pocketbook is analogous to the situation which exists in Title VII *failure -to-hire* cases. Courts uniformly award class-wide relief without any showing that other jobs available in the community were less desirable than the jobs the defendant refused to make available.[31] Discriminatory-departmental-assignment Title VII cases are neither more nor less than failure-to-hire cases. The failure to hire here is a failure to hire into a particular department.[32] Just because the other job the plaintiff received when he was discriminatorily prevented from being hired into one department was in the same plant is not a sufficient reason for increasing the plaintiffs' prima facie burden of proof.

Title VII of the Civil Rights Act prohibits all forms of racial discrimination in all aspects of employment. The degree of discrimination practiced by an employer is unimportant under Title VII. Discriminations come in all sizes and all such discriminations are prohibited by the Act.

Rowe v. *General Motors,* 457 F.2d 348, 354 (5th Cir. 1972).

[3] The plaintiffs in the instant case were found to have failed to establish a prima facie case, for both injunctive relief and

backpay purposes, because they did not show economic harm—*i.e.*, that they were disproportionately assigned to less desirable departments. *Quarles, N.L. Industries, Hayes II, Reed, U.S. Steel,* and *Rowe* all lead us to the conclusion, buttressed by the broad statutory language, that, at least for the purposes of injunctive relief, plaintiffs need not show that they were assigned discriminatorily to *less desirable* departments in order to prove a prima facie case of racial discrimination.

For purposes of backpay relief, *U.S. Steel* holds that economic harm is not required to be shown as an element of a prima facie case unless the defendant has shown "convincingly" by "statistically fair exhibits" that the class earned "at least as much as a plant-seniority comparable group of whites." The district court's desirability finding was based on a "rough index" chart which it used in "the absence of other more reliable data." As demonstrated above, the chart contained patent inaccuracies. It does not amount to a convincing showing by a statistically fair exhibit of earnings equality.[33] In addition, the chart did not even attempt to correlate seniority-comparable workers. In the instant case, therefore, the defendant's evidence did not "draw into substantial question the group's entitlement to [backpay]."[34]

[4, 5] Without attempting to lay down a rule for all cases, it was error to require plaintiffs to prove economic harm as an element of their prima facie case of racially discriminatory departmental assignment.[35]

C. Scope of the Prima Facie Inquiry on Remand

Since the district court was in error when it ruled that plaintiffs had failed in their proof the case must go back for further consideration. Errors apparent in prior procedures indicate that we should now define the prima facie inquiry to eliminate the

likelihood they would recur on the reconsideration we now mandate. It would be inappropriate for this court to decide here, whether a prima facie showing was made. Not only do we not decide it, but also we do not intimate how it should have been resolved. This evidence-weighing process should be conducted by the district court in the first instance, especially since the question is so obviously a close one. We emphasize that despite our directions as to procedures and parameters on remand, we intimate no decision as to what the district court's ultimate conclusion should be.

Plaintiffs argue that previously the court limited its inquiry only to Steelworkers Union departments, exclusive of such departments as were covered by OFCC, plus Welding and Maintenance. Also, they contend that neither pre-'65 policies of discrimination nor statistics showing overall lower job class assignments to blacks were sufficiently considered. Finally, they claim undue weight was given to a 1972 yearly wage comparison. The trial court's opinion does not make it apparent that the weighing of this evidence ever actually took place (although several elements were discussed). The lack of proof of harm necessarily sidetracked the prima facie case conclusion.

[6] The most important aspect of determining whether a prima facie case has been proven is to identify the proper scope of the evidentiary examination. The authorities speaking to this scope all conclude that the question should be whether the class has established a history of broad patterns of plant-wide racially discriminatory departmental assignments.[16]

> [T]he *class* must demonstrate a prima facie case of employment discrimination. Sometimes statistical evidence alone will suffice; on other occasions live testimony or additional exhibits may be necessary. At all events, however, the stress . . is upon demonstration of the defendant's broad employment policies and practices, the defendant's rebut-

tal and business necessity defenses, and the inferences which remain at the close of the evidence.

United States v. *United States Steel,* 520 F.2d 1043, 1053 (5th Cir. 1976); *citing, United States* v. *T.I.M.E.—D.C.,* 517 F.2d 299, 315-16 (5th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40, 53-55 (5th Cir. 1974); *United States* v. *Hayes International Corp. (Hayes II),* 456 F.2d 112, 120 (5th Cir. 1972).

[7] During the class-wide inquiry, commonly referred to as phase one,[17] the court must also define the limits of the class actually entitled to relief and determine the relief necessary. Composing the makeup of the affected class is usually one the more difficult Title VII tasks.[18] The temptation to expedite the handling of a complicated Title VII case such as the one before us here urges a court to combine the determination of the prima facie case phase and the delineation of the affected class. These are separate problems and must be handled separately.[19] The combination of a prima facie case determination and an affected class limitation inevitably results in a narrowing of the broad prima facie case inquiry or broadening of the affected class delineation. Neither result is permissible. Title VII adjudicatory procedures are complex. In this maze of shifting of burdens and first-narrow-then-broad areas of trial court concern, it is particularly important that a court proceed only one step at a time.

The first inquiry should be whether a prima facie case has been shown. In the instant case that requires us initially to focus on whether a history existed at Pullman-Standard of broad patterns of plantwide racially discriminatory departmental assignments.

(1) *Disparate Department Assignments*

[8, 9] Although there are 28 departments at Pullman-Standard, the court's opinion and the chart from which it draws its major conclusions did not consider the two Machinists Union departments, the single-member Boilerhouse department, the departments covered by the OFCC agreement, and the Welding and Maintenance departments. In addition, the court found five of the remaining departments to be fairly statistically balanced. Thus, under its decisional framework, what was left was to decide whether a showing that nine departments are racially imbalanced makes out a prima facie case of racial departmental assignment. On remand, this entire analysis must be discarded. The appropriate evidentiary examination should focus on the *plant as a whole* to determine whether there have been racially discriminatory assignments.[40]

Many courts have found departmental assignments to be discriminatory where statistics showed absolute or almost absolute one-race departments.[41] The inference of discriminatory assignment in such complete exclusion or only token inclusion situations is much more direct than we have here.[42] But it is not necessary to show complete or substantially complete segregation by departments.[43] When the departments are racially mixed but simply do not represent the plant-wide balance, the inference of discriminatory assignment is much more difficult to draw. If the focus were only on the statistical racial disparity in nine departments, one could not conclude that a prima facie case existed. However, these statistics need not be viewed in this sort of vacuum. There exists a great deal of other evidence in the record which must also be entered onto the balance. It is this additional evidence which must be considered in the first instance by the trial court so that the balance can be struck according to the inferences that court chooses to draw.

(2) *OFCC Departments*

[10, 11] In its initial prima facie case inquir the court examined only those departments not covered by the OFCC agreement. The logic of its reasoning was sound, as far as it went—discriminatory assignments which are shown by these departments' statistics showing heavy segregation have been cured by OFCC.[44] But, the scope of the court's examination should have continued to be whether there had been past discriminatory racial assignments instead of stopping at answering whether the most glaring past discriminatory racial assignments were no longer frozen in by department seniority. The face that discriminatory assignments were made to these nine departments is clearly probative on the issue of whether plant-wide racially discriminatory departmental assignments existed. In this case where percentage discrepancies could indicate subtle discrimination or no discrimination in the remaining departments, the elimination of the unmistakable discrimination in these nine departments skews the analysis. An inference can be drawn from this proof that discrimination in departmental assignments stopped at these most segregated rosters. Another conclusion is that every department was involved. Whether either of these or some inbetween conclusion should be drawn will most probably depend on the other evidence presented and is for the trial court. But, the evidence must be assayed for this purpose to keep the process right.

(3) *Machinists Union Departments*

Similarly, the racial makeup of the Machinists Union department should also be considered in the prima facie balance. Pullman-Standard made assignments to these departments as it did the others. Although the court states in a footnote that the Machinists Union departments are included in the OFCC agreement, it appears that the departments were not included as all-white departments into which any blacks hired before the cutoff

date could transfer. Instead, the departments appear to be opened only to the extent that blacks in all-black departments could transfer into them. The actual effect of the OFCC plan on Machinists Union departments must be clarified on remand. Plaintiffs contend the Machinists Union departments were all-white and should have been included in the OFCC agreement as transfer-in departments for any black hired before the cutoff date, not just blacks who were assigned to all-black departments. Plaintiffs claim that these departments were still all-white in 1974. The district court made no finding regarding the racial composition of these departments in 1965 or 1974 and drew no inference from their composition. On remand it must do so. If blacks were excluded from these departments in the past, the departments must be included in the relief ordered by the court as departments to which any black hired before the cutoff date may transfer.

Moreover, the racial makeup of these departments in 1965, especially if they were all-white and high-paying departments, could be probative of plant-wide discriminatory assignment. The broad plant-wide scope of examination required during the prima facie case determination requires that this evidence be evaluated.

(4) *Welding and Maintenance Deaprtments*

[12] The court indicated that special skills are required for Welding and Maintenance departments and, therefore, they should not be considered as to whether there was plant-wide racially discriminatory departmental assignment. This conclusion would only be justified if the defendant could show that blacks were excluded from these departments because they lacked minimum qualifications and if such qualifications were justified by a business necessity.[45] Neither finding appears in the district court's opinion. Unless these findings can be made, the racial makeup of both departments must also be considered in determining whether a prima facie case has been shown.

(5) *Past Policies of Discrimination*

[13] Plaintiffs contend that prior to 1965 blacks were discriminatorily assigned to departments and were discriminatorily assigned to lower paying job classes within each department. They point out that in 1964 98.4% of the blacks and only 15.8% of the whites were qualified to work in job classes 8 or below, while 79.7% of all whites were in job classes 10 or above. Since arbitration decisions in 1965 eliminated upward mobility barriers for blacks within each department, it would be logical to assume that in the 8 years between 1965 and 1973—if the disparity in job classes had truly resulted from the limitation of upward mobility within each department and not from discriminatory assignment to lower paying departments—that there would be substantial improvement in these figures. But, plaintiff's exhibits show that in 1973 74.1% of blacks still remained assigned to job classes lower than 8 while 80.7% of all whites were assigned to job classes over 10. If this evidence is not rebutted by substantial evidence that blacks were not qualified to progress within their departments, it indicates that blacks were assigned to less desirable departments and should be weighed in determining whether a prima facie case has been made.[46] The district court not only rejected consideration of the evidence, but also inexplicably discussed completely different figures from those shown in the record. If it is pertinent, this statistical discrepancy should be clarified on remand.

[14] The district court recognized that until mid-1965 job classes were segregated by Pullman-Standard. Plaintiff states that 134 out of 148 job classes were all-white or all-black. The district court found that this job class segregation phenomenon has substantially dissipated and, therefore, did not give this past practice any weight. However, the prior history of discriminatory job class assignments is clearly relevant to the issue of whether the present discrepancies in departmental assignments were part and parcel of a broad scheme to treat

black and white workers differently. Historical policies of racial discrimination have often been used by other courts as indicia of plant-wide discriminatory conduct.[47] The weight to be given and the inferences to be drawn are for the trier of fact.

(6) *Average Yearly Wage*

[15, 16] The district court buttressed its conclusion that there was no perpetuation of discriminatory racial assignment at Pullman-Standard by referring to 1973 wage proof which showed that the gross yearly income of blacks from Pullman-Standard employment and unemployment benefits was 96.8% of that of whites from the same sources.[48] These statistics must be carefully examined. *United States* v. *United States Steel,* 520 F.2d 1043, 1054 (5th Cir. 1976), teaches that such wage parity is relevant only if groups with similar seniority are being statistically compared.[49] The figure used by the district court does not attempt only to compare groups of blacks and whites with relatively equal seniority. This is especially pertinent here because this record indicates that in general blacks have more seniority than whites at Pullman-Standard; if discrimination had not been perpetuated, blacks reasonably might be making more than whites. In addition, this yearly salary parity does not include two other extremely relevant factors: amount of overtime worked and number of weeks or hours worked. Because the figures did not consider seniority, overtime, and time worked, they were not a reliable indicia of even rough wage parity in 1973.[50] Their use by the district court was not proper.

(7) *Summary*

The district court must examine the evidence presented concerning the plant as a whole to determine whether a prima facie case of discriminatory departmental assignment has been made. If a prima facie case of past discrimination has been shown,[51] the court must then determine if it has been perpetuated. If such a determination can be made, then as a second and separate step

the court must limit the broad certified class to appropriate affected classes or subclasses and order necessary relief.

D. Perpetuation of Past Discrimination

[17] The district court did not find any discrimination which could be perpetuated by the departmental seniority system in use at Pullman-Standard. Although it did find that the nine departments included in the OFCC plan were previously completely segregated, it determined that the OFCC provision allowing carryover departmental seniority for transferring discriminatees broke down any barriers for these blacks in reaching their rightful place in the plant. The approval of the OFCC plan (with slight expansions in effective dates) was a proper judicial recognition that if the departmental seniority system in effect at Pullman-Standard was left to function without modification, it would perpetuate past discrimination. The case law precedent is legion if not unanimous in holding that departmental seniority plans similar to that in use by defendant do perpetuate past discrimination.[11] If the trial court should find that the plaintiff has shown plant-wide discriminatory racial assignment has been perpetuated by the departmental seniority system, this barrier to transfer, which bars blacks from their rightful places in the plant, must fall.[12]

E. The Limitation of the Affected Class

Before the Court is able to order appropriate relief, however, it must define the plaintiff class affected by this discriminatory conduct. In a factual milieu such as that provided at Pullman-Standard, the two limiting factors on the definition of the affected class will be the number of departments covered and the hiring date upon which discriminatory departmental assignment ended. These two considerations—department and end date—will define the parameters of the affected class.

(1) *Affected Class Departmental Limitation*

[18] The purpose of this second Title VII decisional step is to narrow the certified class only to those members most probably entitled to relief.[14] In performing this task the court should first delineate the elements of the plaintiffs' proof which were sufficient to make out a prima facie case of racially discriminatory departmental assignment. If these elements are clearly and convincingly inapplicable to a particular department, the department must be eliminated from membership in the affected class. In a completely segregated departmental situation, this limitation by departments may be easy.[15] In mixed department cases, however, the court may choose to order relief which applies plant-wide to all black employees hired before a certain date.[16]

Of course a defendant may also attack the inclusion of a particular department for reasons entirely separate from whether the elements of the plaintiffs' prima facie case are applicable. For example, proof that there have been specific requests by all black applicants not to be assigned to a particular department could well exclude a department from membership in the affected class. The burden of proving departmental exclusion in this latter type of situation would be on the defendant.

(2) *Affected Class Time Limitation*

[19] If the court determines that plant-wide discriminatory assignment exists, it must limit the class to all blacks hired before the date when this historical discriminatory assignment process ceased.

[20] Plaintiffs attack the dates used by the lower court when it expanded the time limitation on the departments under the OFCC agreement. The court used as the significant date the date when the first black or white was appointed to the all-white or -black department respectively. Token integration, however, does not signal the end of discrimination. These dates must be

reconsidered. It is improper to end affected class membership at a date upon which the first black or white was assigned to the department unless this date signifies the end of the discriminatory practices.[17] Otherwise, the court must use a date which clearly signifies the end of a racially discriminatory departmental assignment.

Should the affected class be broadened on remand, the same analysis must be used whether the court chooses to limit the hiring date time factor of the affected class on a department-by-department or on a plant-wide basis.

III. APPROPRIATE RELIEF

If there ever was a time of facile Title VII litigation, it surely ended with the demise of intentional violations of equal employment opportunity. Today's parade of Title VII cases present more and more subtle manifestations of discrimination. Proof of invidious practices becomes more difficult as the ability to separate the real violation from the unfounded suspicion grows harder. This is especially so since many employers and unions, including Pullman-Standard and Steelworkers, have made substantial good faith efforts toward eliminating racial distinctions for the work force. Frequently, bargaining which results in minority employees being hired and allowed to progress in their jobs free of discrimination does not accord the Act's intended relief to older black employees. Although the temptation to enforce the accomodation reached by the parties most directly interested is great, it remains part of the court's task to see that these older workers, who bore the brunt of past disparities, do not continue to work at jobs their white peers would not have and for wages less than those paid to recent hires who were not put down because they were black.

A. Red Circling

Red circling is the mechanism by which the wage rate of an affected class member who transfers goes with the man—even though the new department to which he moves would pay the transferee a wage rate less than the old one. The purpose of the remedy is to protect the employee from financial loss until he has an opportunity to learn the necessary skills to progress in the new department to a wage equal to his old department scale.

The district court held that red circling in the instant case was unnecessary for six reasons: (1) "[V]irtually all of the jobs in the transfer out departments have lower job class levels than the lowest jobs in the transfer in departments." (2) There are no lines of promotion or residence requirements to impede promotion in new departments. (3) Frequent manpower fluctuations may create new opportunities. (4) Some of these manpower fluctuations will obviate old wage rates. (5) No training is provided for new jobs. (6) The key reason for affected class members turning down transfer opportunities is apprehension over retreat rights and not the possibility of diminished wages.

Should the court find plant-wide discriminatory departmental assignments were perpetuated by the departmental seniority system, several of the six reasons discussed above would be inapplicable. However, since we hold that some kind of modified red circling system probably will be necessary even if the affected class is not expanded, we do no more than mention this contingency which an expanded affected class would present.

[21] The red circling remedy was originally developed to eliminate impediments to discriminatees rising to their rightful place in a plant. Therefore, whenever the possibility exists of receiving lower wages in the new department, red circling must be ordered. The remedy must continue until the transferee had had an opportunity to progress to the new department job which he would have held but for the past discrimination. For

this reason, it is now clear that red cycling is a necessary element of a Title VII remedy in most,[58] though not all,[59] cases.

[22,23] The only situation where we have recognized that this part of the remedy would not be mandated is where the plaintiff is unable to show that the absence of red circling presents a practical impediment to *any* affected class member. *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 113 (5th Cir. 1975); *accord, Watkins* v. *Scott Paper co.*, 530 F.2d 1159, 1174 (5th Cir. 1976). The district court's major premises for refusing to order red circling were its conclusions that (1) "virtually all" affected class members will be able to transfer immediately to higher paying jobs and (2) the key reason for nontransfers has been apprehension over retreat rights and not lower wages. Neither reason appears to meet the *Stevenson* and *Watkins* standard. The test is not whether "virtually all" discriminatees will not suffer reduced wages. If *any* will suffer, red circling is appropriate. On remand, unless the district court determines that the plaintiffs have failed to show that *any* discriminatees would suffer diminished wages on transfer, red circling must be ordered.[60] This would also be true should the affected class be expanded on remand. Apprehension over retreat rights could only result from ignorance of the OFCC agreement's provisions. Full and complete retreat rights are guaranteed. Surely neither Pullman-Standard nor the union should or will allow ignorance of rights already conferred to operate as a bar to departmental transfer. When the fear over retreat rights has dissipated, the possibility of reduced wages surely will be seen as the major impediment to transfer. Neither of these considerations can pass the *no*-affected-class-member test.

The four other reasons given by the district court are insufficient to justify its refusal to order red circling.[61] However, the lack of on-the-job training and lines of progression along with frequent fluctuations in the work force indicate that the standard red circling remedy would be inappropriate and that some modification of that remedy is needed.

[24] The purpose of red circling—to eradicate the obvious impediment of lowered wages to transfer to a new department—is meant to protect the affected class transferees only until they have been in the new department a sufficient amount of time to have had a realistic opportunity to become recognized and listed as qualified to work in a job class which pays at least as much as the old department wage rate.

Job manpower fluctuations, which are particularly acute in some departments offering greater advancement opportunity, create problems for devising a remedy which will not go too far and convert the attempted remedy into a windfall. The lack of on-the-job training and lines of progression also present problems for the trial court. They are not ones appropriate for resolution or detailed suggestion here. Suffice it to say that if the remedy is required, it must be devised justly—but, if required, it must be granted despite difficulty in its formulation.

B. Posting

[25] The union contracts with Pullman-Standard do not provide for a formal bidding procedure or a posting of vacancies either plant-wide or department-wide. In fact, not even an after-the-fact notification of changes in assignments was required.[62] Pullman-Standard asserts that the absence of these formal notification and bidding procedure impossible and the posting of assignments unnecessarily burdensome. The plant operates on a "word of mouth"[63] and "personal observation" approach to the notification of job vacancies. In addition the union takes a very active role in monitoring employees' seniority rights.

Plaintiffs requested below that a plant-wide system of posting job vacancies be ordered for the Pullman-Standard plant. The court framed the issue as: "Has there been discrimination in the failure to post publicly a list of changes in assignment?" Its answer was that "the lack of formal procedures for notification neither discriminated nor perpetuated the effects of

any past discrimination against blacks." So addressed, the claim is limited to whether the notification system prevented blacks from taking full advantage of their seniority rights. The court's answer is not clearly erroneous. However, it only answers the questions of nondiscrimination and perpetuation of discrimination presented by the posting issue per se. The propriety of ordering posting to facilitate transfer rights has not been considered.

Not only must posting be examined to see if the lack of a formal system itself discriminates or perpetuates prior discrimination against blacks, but the ordering of a formal posting remedy must be considered as a part of the remedy which will facilitate the advancement of the affected class members to their rightful places in the plant. The illegal discrimination found at Pullman-Standard was racially discriminatory departmental assignment. We hold that the neutral departmental seniority system has perpetuated that discrimination into the present. Carry-over seniority, red circling, and backpay are parts of the total remedy. The need of a formal system of notification of plant-wide vacancies to make the remedy efficacious must also be reconsidered. If *any* affected class member would be prevented from exercising his transfer rights because the present non-system failed to notify him of a vacancy then some more formal system of notification must be ordered unless business necessity prevents it.[44]

C. Backpay

The district court did not award any backpay, and except for one small subclass of discriminatees no adjudication regarding backpay has been made in the instant case.[45] Plaintiffs' attack on the failure to award any backpay in this action is premature. The pretrial order of June 5, 1974 severed backpay claims for a subsequent trial should they be necessary.

The OFCC agreement identified five all-white departments and allowed blacks hired prior to April 30, 1965, to transfer into these departments with carry-over departmental seniority as vacancies occurred. The trial court ordered that the cut-off date for transfer into three of these departments, plant protection, inspection, and air brake departments, be extended until June 1, 1967, June 1, 1970, and June 1, 1971, respectively, to allow blacks who were discriminatorily prevented from being assigned to those departments adequate transfer rights. The court recognized that any blacks hired between April 30, 1965 and these new dates were entitled to backpay. However, it also recognized that no backpay would be necessary if there were no vacancies in these departments prior to transfer.

The court did not hold that there were *no* vacancies; instead, it held there were not enough vacancies to allow this class of employees at the bottom of the eligibility group to be assigned to these departments. Here the district court obviously had reference to the priority enjoyed by senior affected class members which would preclude workers in the expanded affected class from eligibility for transfer to one of these departments. This finding by the court is not clearly erroneous. However, the legal conclusion that the expanded class is not entitled to backpay must be reversed since it was reached using an erroneous legal principal.

[26] A finding of *no* vacancies in these departments would support a conclusion that no entitlement to backpay existed, as would a finding that all vacancies were filled by more senior discriminatees. The court did not make either clear-cut, absolute factual finding. Rather, it inferred that since there were so few vacancies and since the expanded affected class' priority was so low, they would have been precluded by more senior discriminatees. This inference is precluded by *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975).

Baxter requires a two phase backpay inquiry. During the first or general phase the class must show its entitlement to backpay. This is presumptively shown once employment discrimination has been found.[46] The second or specific phase allows each discriminatee to present the backpay claim to which he is presumptively entitled unless the defendant bears the burden of proving nonentitlement. A general inference of class-wide unavailability of vacancies is insufficient.[47] To avoid liability the defendant must show during phase one that no vacancies whatsoever were available or during phase two it must show that the particular discriminatees seeking backpay could not have been assigned to that department nor transferred to it because of the unavailability of vacancies they were eligible to fill.

Of course, we pretermit any indication of appropriate resolution of the severed claims for backpay. We would only note that if on remand the court should expand the affected class, substantial backpay issues would be raised.[48]

IV. SUPERVISORY PERSONNEL

The appointment of supervisory personnel at Pullman-Standard is done totally subjectively. There are no established criteria for selection of new foremen. The plant manager and superintendent choose department heads (C foremen) who in turn select track supervisors (B foremen), production foremen (A or salaried foremen) and hourly (temporary) foremen. Plaintiffs contend that prior to 1965 there were no black foremen. In 1966 the first black salaried foreman was promoted to one of the 143 existing salaried foreman positions. Four years later there were only nine black salaried foremen while there were 151 white foremen. At the time of trial there were 13 departments in which blacks had never been offered either salaried or temporary foreman positions. Since 1966 and until the time of this trial there were at least 59 salaried foreman vacancies. Only 12 of these were filled by blacks.

The district court essentially agreed that these statistics were correct but chose to focus on the selection of hourly foremen since they in turn formed the source group for the selection of salaried foremen. The court found that since 1965, 56 blacks — approximately ⅓ of the total number — have been selected as hourly foremen. Recognizing that this was a lower percentage than the approximately 50% of black personnel in the plant, the court found four factors which ameliorated the otherwise compelling inference of discriminatory promotion.

[27] 1. The court found as a fact that a greater number of blacks than whites were functionally illiterate and, therefore, were less likely candidates for promotion. Educational requirements which operate disporportionately to exclude blacks may not be used unless they pass Title VII validation and business necessity muster.[69] The court itself recognized in a footnote that it was not holding that some particular level of education was allowable under Title VII. Despite this recognized absence from the record of validation or business necessity proof, the court found this absence of functional literacy would render black employees "less likely" candidates for promotion. This non sequitur is impermissible.[70] Since no minimum educational requirement was proven legal under the strict guidelines of Title VII, the "requirement" may not be used as a generalized inference to explain why blacks were not potential supervisors.

[28] 2. The court found that 30 blacks and 17 whites have turned down hourly foremen opportunities since the mid-1960's. This, of course, is a legitimate item of rebuttal to a prima facie case. The most statistically pure representation of discrimination would be the percentage of black vs. white offers of promotion. A comparison of actual appointments with the number of turned down offers would enable the court, if the number of actual offers was not before it, to approach this statistically sterile measure.

[29] 3. The court concluded that due to pre-'65 segregation of jobs, it has taken blacks some time to learn the range of job skills necessary to perform supervisory duties. This justification for not promoting blacks to supervisory positions has been uniformly rejected by this court. Before such justification could be considered the defendants would have to prove that unpromoted blacks did in fact lack the necessary skills; that the needed skills are justified by a business necessity; and, if plaintiffs could show that the failure to gain these skills was the result of a neutral policy which perpetuated past discrimination, defendants would have to show that the policy was justified by business necessity.[11] Since none of these facts were found by the lower court, it was improper to consider this item as indicative of nondiscrimination.

4. The district court noted the recent dramatic improvement in black promotions to salaried supervisor. Between 1971 and 1974, eight of the twenty newly appointed foremen were black. This figure is clearly indicative of the lack of discrimination in promotion. It is appropirate to consider it as counterbalancing evidence of the statistics indicative of discrimination which were presented by the plaintiffs.

[30, 31] Since two of the four reasons given for finding that the plaintiffs' statistics did not establish a prima facie case of racially discriminatory promotion to supervisory positions were erroneously considered, the court's conclusion that no discrimination was proven is reversed. We do not conclude, however, that the evidence clearly makes out a prima facie case. Instead, we remand to the district court to balance recent promotion statistics and black turn-downs against the overall statistics presented by the plaintiffs.[12] The inference to be drawn from this balancing of the evidence is for the lower court. Should the court desire supplemental evidence in its reconsidering it may on remand open the record to evidence concerning promotions made since trial.

V. WORK WITHIN THE SAME JOB CLASS

[32] With but one exception the management of Pullman-Standard has the sole authority under the collective bargaining agreement to assign work among employees working within a given job class in a given department. The only exception is that members of the welding department are able to bid to their supervisors for "sub-assembly" work according to departmental seniority. Plaintiffs argue that the supervisors in exercising this unbridled discretion give the more desirable assignments to white employees and the less desirable ones to blacks. The lower court not only found that the plaintiffs had failed to prove that blacks were assigned to less desirable tasks within each job class, it also found that the plaintiffs were unable to prove which tasks were more or less desirable. The totality of the proof clearly showed that various employees had varying interpretations of which tasks within each job class were more or less desirable. Given nothing but this kind of subjective opinion evidence, especially since the credibility of each witness was at the core of the issue, we are unable to say that the lower court's factual conclusion was clearly erroneous.

VI. INDIVIDUAL CLAIMS

[33] The lower court concluded that Louis Swint and Clyde Humphrey were not discharged for racial reasons as alleged. Insubordination, the principal reason given for the discharge in each instance, was more than amply justified. The court's conclusion that there was not even the slightest evidence anywhere in the record upon which it could indulge the inference that these individuals were fired because they were black is not clearly erroneous.

VII. NOTICE OF APPEAL

[34] Pullman-Standard's attempt to limit the issues on appeal solely to these presented by Louis Swint in his individual capacity is without merit. *Jones* v. *Chaney & James Construction Co.*, 399 F.2d 84, 86 (5th Cir. 1968); *Markham* v. *Holt*, 369 F.2d 940, 943 (5th Cir. 1966); *see Foman* v. *Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225 (1962).

CONCLUSION

The judgment appealed from is vacated and the cause is remanded to the district court for such proceedings as that court may determine are appropriate or necessary to compliance with this opinion.

AFFIRMED IN PART, PART VACATED AND REMANDED.

Appendix B - Footnotes

[1] The factual statement was taken substantially verbatim from the opinion of the disrict court.

[2] Orders may be for as few as 25 cars or for several thousand.

[3] The number of workers in Steelworkers units at the Bessemer plant varies from over 2,800 at peak employment periods to less than 200 at the lowest levels. During 1973, which was not abnormal in this respect, on only three occasions was the employment level in one week approximately equal to that of the prior week. Indeed, a chart based upon monthly employment hours from early 1958 to mid-1974 reflects only a very few times that hours worked in one month have been approximately the same as in any of the two months preceding or following. Changes in the work force were occurring during the several weeks this case was tried.

[4] Millwrights and certain employees in the Die and Tool Department are represented by the International Association of Machinists and Aerospace Workers, AFL-CIO. For the limited purpose that some of the relief sought by plaintiffs might entail possible modification of its contract with Pullman-Standard, the I.A.M. and its Local Lodge 372 were joined as defendants named in any charges before the EEOC or involved in the allegations of the pleadings in this case.

[5] While the job classification manual lists some 250 jobs, many of these are not worked at Pullman-Standard, and several of the classifications—particularly, laborer, cleanup, craneman, and hook-on—appear in a number of departments as separate listings. The plaintiffs identified 123 jobs from the June 1973 seniority rosters, but even this figure includes duplications where the same job appears in more than one department.

[6] According to data showing the average number of persons drawing paychecks by department over an 18-month period ending June 1974, over 50% of the employees work in the Welding and Steel Erection Departments and almost 77% work in those departments plus the next four largest (Paint & Shipping Track, Punch & Shear, Steel Construction, and Maintenance).

[7] For example, Cleanup man, JC 1, has the lowest nonincentive standard hourly rate ($3,635 as of October 1973), while Template Maker Craft, JC 20, has the highest such wage ($5,399 as of October 1973). Piece-rate scales and production quotas are frequently of great significance in determining the actual earnings potential of a particular job.

[8] There are a score or so of female production and maintenance workers at Pullman, both white and black. Due to the predominance of male employees, however, the masculine gender for pronouns is used for convenience in this opinion.

[9] Actual work-hour figures for 1965 were not available; nor was the June 1, 1965 seniority list. However, by looking at the June 1964 seniority list and by taking account of the additions and deletions to that list representing hires and terminations during the year, the trial court constructed the functional equivalent of the June 1965 list. This calculation reflects 1,151 blacks and 1,773 whites on the seniority list as of June 1, 1965. While the seniority list does not absolutely reflect actual employment at any particular time, it does bear a significant correlation therewith in a period of high employment, such as June 1965 (in excess of 2,350 average workers for the month). It may be noted that the actual employment of blacks in the December 1972-June 1974 period, *i.e.*, 49.5%, exceeded slightly the percentage of blacks on the seniority lists for June 1972 and June 1973, *i. e.*, 44% and 46% respectively.

[10] That the percentage of black workers at Pullman-Standard is higher than the percentage of black population or work force in Jefferson County, or even in Bessemer, does not, however, indicate hiring bias in favor of blacks. While data has not been compiled to compare actual applications for employment with hiring at Pullman for the period, one can, by analyzing the seniority rosters from 1966 through 1973, determine that approximately 36% of the new hires during that period were black, a percentage which is compatible with work force and population data from the census. Presumably, the analysis of quits and discharges during 1971 showing that during that year almost three times as many whites as blacks either quit or were discharged, would be typical for the entire period. One may speculate that relative job opportunities with other employers were better for whites than for blacks and that relatively more blacks than whites chose to accept recall to Pullman after layoffs.

[11] For a number of years the labor agreement had contained language requiring its provisions to be applied without discrimination, but prior to the McCoy arbitration decision in March 1965 this language had been without apparent significance.

[12] A temporary promotion results in some increase in compensation and, perhaps more significantly, is the principal avenue by which an employee can obtain recognition as capable of satisfactorily performing the job.

[15] The memorandum contained provisions similar to those later incorporated in the 1972 agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

[16] Over a hundred blacks have received welder training at company expense and become welders at Pullman (though many have since gone with other companies). Without denying the benefits such training has provided to blacks, plaintiffs do note that with respect to welder jobs, the company has instituted a requirement that before it will test a welder's competency the employee must now show either formal training or field experience with some other company.

[17] The union has never formally adopted the agreement, but in practice has accepted the terms thereof to the extent that it must be deemed bound thereby.

[18] Employees from the low-ceiling departments, if possessing minimal qualifications, can also obtain vacancies arising in the I.A.M. units. In such event, they take their plant age into such units for the purposes of layoff and recall and, when vying against other apprentices at the same level, for promotional purposes. Without formally concurring in the agreement, the I.A.M. has apparently accepted the provisions and implicitly agreed to be bound thereby.

[19] The class was defined as consisting of all black persons who at any time subsequent to 1 year prior to the filing of any charges with the EEOC had been employed by Pullman-Standard (at its Bessemer plant) as production or maintenance workers in positions represented by the United Steelworkers. General notification to class members specified these as the issues in the case and stated that the entitlement to back pay, if any, by any members of the class would be determined by subsequent hearings, but only if the class prevailed on one or more of the four issues.

[20] In the pretrial order this issue was defined as subsuming the contentions on behalf of the class that the agreement with the Department of Labor was inadequate in the following respects: the transfer rights applied only to four departments; the agreement did not provide for "red circling", *i. e.*, carrying an old wage rate into a new department upon transfer; only a single transfer was provided; and transfers to I.A.M. positions were not afforded. At conferences during the trial of

the case it became apparent that plainitffs also contended that the transfer rights should have been extended to black employees hired in the 1965-68 period, rather than being limited to pre-May 1965 employees.

[19] Mr. Swint's claims are premised on 42 U.S.C.A. §§ 1981, 2000e—2(a)(1), and 2000e—3(a), while Mr. Humphrey's is grounded only upon 42 U.S.C.A. § 1981.

[20] We recognize that the lower court concluded that discriminatory departmental assignment was present in the nine departments covered by the OFCC agreement (Template, Power, Inspection, Air Brake, Steel Miscellaneous, Plant Protection, Truck, Die & Tool, Janitor). The court, however, determined that the agreement, except for an adopted time extension, adequately eliminated the perpetuation of the discrimination which would otherwise be inherent in the departmental seniority system.

[21] The following chart, constructed by the lower court, reflects by department, ranked by job class ranges, the racial composition of the work force in June 1965, together with certain accumulating percentage figures.

The district court provided the following explanation of the chart:

> A ranking according to job class levels does not mean that each employee would so rank the departments in terms of desirability; but it does provide *a rough index of earnings potentials* in the absence of other more reliable data, such as average earnings or average job class worked. For the Welding department, the court has disregarded the highest job, Welder-Craft (JC 16), using instead the next highest job class, this adjustment being made because the highest position offers such few opportunities considering the size of the department, *i. e.*, less than 1% of the department jobs. This study is based upon seniority rosters in the absence of data showing actual distribution of the work force by departments . . . . [P]ercentage Column II disregards employees for the nine depatments involved in the agreement with the Department of Labor and percentage Column III further disregards the Maintenance and Welding departments. (Emphasis added).

DEPARTMENT	JOB CLASS RANGE	NUMBER OF EMPLOYEES		I		II		III	
		#B	#W	%B	%W	%B	%W	%B	%W
Template	2.20	0	9	0.	0.77	-	-	-	-
Maint.	4.18	26	98	2.26	9.12	2.54	8.98	-	-
Forge	1.17	12	20	3.30	10.06	3.71	10.81	-	-
Power.	6-16	0	4	3.30	11.17	-	-	1.43	6.35
Inspec.	12-13	0	28	3.30	13.55	-	-	-	-
Punch & S	1-13	120	28	13.73	15.94	15.41	13.38	15.75	15.24
Mob. Cr.	5-12	3	2	13.99	16.11	15.71	13.56	16.11	15.87
Press	1-12	48	17	18.16	17.56	20.39	15.12	21.84	21.27
Rail.	7-11	8	10	18.85	18.41	21.17	16.03	2.79	24.44
Air Brake	6-11	0	27	18.85	20.72	-	-	-	-
S. Const.	1-11	124	18	29.63	22.25	33.27	17.69	37.59	30.16
Paint. ST	1-11	91	84	37.53	29.41	42.15	25.39	48.45	56.83
S.Erec.	1-11	290	41	62.73	32.91	70.44	29.14	83.05	69.84
W.Erec.	1-11	65	35	68.37	35.89	76.78	32.35	90.81	80.95
W.Mill	1-11	7	17	68.98	37.34	77.46	33.91	91.65	86.35
Welding	1-10	161	678	82.97	95.14	93.17	96.05	-	-
Wheel & A	1-10	13	30	84.10	96.84	94.44	97.88	93.20	92.70
S.Misc.	2- 9	86	2	91.57	97.01	-	-	-	-
S. Stores	2- 9	45	10	95.48	97.87	98.83	98.80	98.57	95.87
P.Protec.	6- 8	0	12	95.48	98.89	-	-	-	-
L. Stores	3- 8	5	7	95.92	99.49	99.32	99.44	99.16	98.10
M. Stores	3- 8	7	6	96.52	100	100	100	100	100
Truck	1- 6	21	0	98.35	100	-	-	-	-
D & T	1- 5	9	0	99.13	100	-	-	-	-
Janitor	1	10	0	100	100	-	-	-	-
		1151	1173						

[33] Most courts use some kind of average salary comparison instead of wage range comparison. *See, e. g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, *cert. denied* (5th Cir. 1974), 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). Even the lower court in an explanatory note to the chart recognized that a average hourly wage comparison would be preferable. The only two cases which have used wage range comparisons are distinguishable. In *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), the court used job class (not department) ranges—the court was examining discriminatory promotion and hiring, not perpetuation of discrimination caused by departmental seniority. In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va. 1968), discussed *infra*, the court ordered plantwide seniority even though blacks wre not assigned to departments with the least desirable wage ranges.

[34] The chart below ranks the departments in Column III of the district court's chart according to job class median. Departments having the same job class median are ranked, in descending order, according to size, Maintenance CIO and Welding are included while the Mobile Crane Department is not.

Median Job Classes of "Mixed" Departments
As of June 1, 1965

Department	Job Class Median	Median JC Blacks	% Blacks in Dept.	Accum. % B.	W.
Maint. CIO	13	4	21.0	2.5	8.9
Welding	10	6	19.2	18.3	70.6
Paint & ST	7	6	52.0	27.2	78.2
Railroad	7	7	44.4	28.0	79.1
Steel Erection	6	6	87.6	56.4	82.8
Steel Constr.	6	6	87.3	68.5	84.4
Wheel & Axle	6	6	30.2	69.8	87.1
Forge	6	2	37.5	71.0	88.9
Misc. Stores	6	7	53.8	71.7	89.4
Wood Mill	5	2	29.2	72.4	90.9
Punch & Shear	4	3	81.1	84.1	93.4
Wood Erection	4	2	65.0	90.5	96.6
Press	4	4	73.8	95.2	98.1
Lumber Stores	3	3	41.7	95.7	98.7
Steel Stores	2	2	81.8	100.1	99.6

[34] *See United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970) reversing a lower court's failure to consider evidence of black exclusion from a welding department, *albeit* for other reasons.

[35] *See, e. g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[36] The court did, however, recognize that there were no formal lines of progression designed to teach these skills.

[37] *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1177-78 (5th Cir. 1976); *cf. United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[38] *See, e. g., Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1165 (5th Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 726 (5th Cir. 1976); *United States* v. *T.I.M.E.—D.C., 517 F.2d 299 (5th Cir. 1975), cert. granted,* ___U.S.___, 96 S.kCt. 2200, 48 L.Ed.2d 814, (1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 107 (5th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Rogers* v. *International Paper Co., 510 F.2d 1340 (8th Cir.), as modified*, 526 F.2d 722 (1975); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *cert. granted,* ___ U.S. ___, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Herrera* v. *Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974); *Resendis* v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974); *cert. denied,* ___ U.S. ___, 96 S.Ct. 2201, 48 L.Ed.2d 815 (1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 388 (1975); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1368 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 355 (8th Cir. 1973); *United States* v. *Georgia Power*, 474 F.2d 906, 910 (5th Cir. 1973); *United States* v. *Cheaspeake & Ohio Ry.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 307 (8th Cir. 1972); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *United States* v. *Bethlehem Steel*, 446 F.2d 652 (2d Cir. 1970); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert.*

dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Jones* v. *Lee Way Motor Freight,* 431 F.2d 245, 246 (10th Cir. 1970), *cert. denied,* 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971); *United States* v. *Dillon Supply Co.,* 429 F.2d 800 (4th Cir. 1970).

[29] Although four departments were discussed in *Quarles,* only three departments were involved in the relief ordered.

[30]The conclusion which relied on *United States* v. *Hayes International Corp. (Hayes I),* 415 F.2d 1038 (5th Cir. 1969), was phrase: "equity may for the purposes of injunctive relief presume damages from the invasion of a legal right. . . ." *United States* v. *United States Steel,* 371 F.Supp. 1045, 1058 (N.D.Ala. 1973).

[31]. *E.g., Morrow* v. *Crisler,* 479 F.2d 960 (5th Cir.1973), *aff'd en banc,* 491 F.2d 1053 (1974); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970).

[32]. *See Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), *cert. granted,* ____ *U.S.* ____, *96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).*

[33]. *See Ochoa* v.*Monsanto,* 473 F.2d 318, 319 (5th Cir. 1973); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 551 (9th Cir.) *cert. denied,* 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

[34]. *See United States* v. *United States Steel,* 520 F.2d 1043, 1053 (5th Cir. 1976).

[35]. This conclusion, however, should not be misconstrued as a holding that departmental desirability is irrelevant. In fact, departmental desirability could be relevant to the establishment of a prima facie case in two instances: First, as pointed out in *U.S. Steel,* if backpay is sought and if the defendants have convincingly brought into question the class's entitlement to it, economic harm must be shown. Second, a showing that the departments to which blacks have disproportionately been assigned are less desirable departments is probative of racial discrimination. Such a showing could in fact be crucial to the establishment of a prima facie case when the racially disparate assignments are not substantial in number or proportion.

[36]. The relevant inquiry has been variously defined: "pattern and practice," *Sagers* v. *Yellow Freight System, Inc.,* 529 F.2d 721, 729 (5th Cir. 1976); "broad patterns and practices, as opposed to individual damages," *United States* v. *United States Steel,* 520 F.2d 1043, 1049 (5th Cir. 1976); "pattern of past discriminatory hiring," *Sabala* v. *Western Gillette, Inc.,* 516 F.2d 1251, 1261 (5th Cir. 1975); "history of racial discrimination," *EEOC* v. *Detroit Edison,* 515 F.2d 301, 313 (6th Cir. 1975); "history of employment discrimination,"

Johnson v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1373 (5th Cir. 1974); "historical pattern," *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023, 1025 (6th Cir. 1973); "policy of racial assignment," *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 875 (6th Cir. 1973); "pattern and practice of racial discrimination in hiring," *Morrow* v. *Crisler*, 479 F.2d 960, 962 (5th Cir. 1973), *aff'd en banc*, 491 F.2d 1053 (5th Cir.1974); "practices, policies or patterns," *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), *quoting United States* v. *Dillon Supply co.*, 429 F.2d 800, 804 (4th Cir. 1970); "plant-wide system-wide racially discriminatory employment practices," *Jenkins* v. *United Gas Co.*, 400 F.2d 28, 34 (5th Cir. 1968).

[37]. *See Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975). *Baxter* delineates two phases for the Title VII inquiry. Phase One is reserved for class-wide determinations and Phase Two for individual proof of damages for backpay purposes and the assertion of defenses as to individuals.

[38]. *See generally Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *United States* v. *United States Steel*, 520 F.2d 1043 (5thCir. 1976); *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir.1975), *cert. granted*, ____ U.S. ____,96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

[39].In *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 375 (8th Cir. 1973), the reviewing court first established that a prima facie case had been shown and then proceeded to delineate the bounds of the affected class. *See also Stevenson* v. *International Paper Co.*, 516 F.2d 103, 117-18 (5th Cir. 1975).

[40]. In rejecting the limitation of the scope of the court's examination to the statistical imbalance of nine departments, we likewise reject the notion that a Title VII prima facie case of discriminations could be shown merely by proving that some departments in a plant do not approximate the racial makeup of the plant.

[41]. *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747,96 S.Ct.1251, 47 L.Ed.2d 444 (1976); *Johnson* v. *Goodyear Tire & Rubber*, 491 F.2d 1364 (5th Cir.1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354,355 (8th Cir. 1973); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 306 (8th Cir. 1972); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (5th Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

[42]. In evaluating the evidence presented in *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir.1971), *cert denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), this court stated:

> Certainly the weight to be accorded this [discriminatory] inference varies: much depends on the correctness, completeness, and comprehensiveness of the figures proffered. Measured by these criteria, the Government's statistics *sub judice* should have been given substantial weight. They disclose that *all* persons hired for higher paying positions and *most* people promoted to these jobs after Title VII's effective date were white. Absent explanatory evidence and tesimony, the statistics indicate that officials have impliedly equated job qualifications with race.

[43]. *See Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States* v. *Bethlehem Steel*, 446 F.2d 652 (2d Cir. 1970); *cf. United States* v. *T.I.M.E.- D.C.*, 517 F.2d 299 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

[44]. The existence of an OFCC agreement does not provide the company with a defense to the Title VII action. *See Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1166 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 106 (5th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir.), *as modified*, 526 F.2d 722 (1975); *United Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir.1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

[45].*See* notes 25 & 27 *supra.*

[46]. Title VII cases have often considered similar historical discrimination policies in evaluating the prima facie case aspect. *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1165 (5th Cir. 1965); *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 107 (5th Cir. 1975); *Gamble* v. *Birmingham So. R.R.*, 514 F.2d 678 (5th Cir.1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir.), *as modified*, 526 F.2d 722 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 221 (5th Cir.1975); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1369 (5th Cir. 1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 355 (8th Cir. 1973); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 306 (8th Cir. 1972).

[47]. *See* note 46 *supra.*

[48]. In this highly volatile employment, workers were frequently laid off. Plaintiffs contend that the reason this gross pay comparison looked as good as it did was because blacks working at lower paying jobs with better seniority experienced fewer layoffs. Thus to receive comparable payments from Pullman-Standard, whites worked fewer hours and drew unemployment benefits while vacationing or working at jobs for others. The district court indicated this contention might have some probity by its finding that the desirability of majority black jobs was enhanced by stability and less frequent lay offs than higher paying majority white jobs.

[49]. This court has previously indicated in dicta that consideration should be given to including supervisory and clerical personnel, especially if they are heavily white, in such average yearly wage racial comparisons. *United States* v. *Hayes International Corp. (Hayes I)*, 415 F.2d 1038, 1040 n. 3 (5th Cir. 1974).

[50]. The use of statistics and similarly statistical wage comparisons must be conditional on the "absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn." *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971); *accord, Ochoa* v. *Monsanto Co.*, 473 F.2d 318, 319 (5th Cir. 1973); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[51]. For an example of this prima facie case approach, see *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). There, this court focused on the percentage variance from the plant's racial norm in each department, various tests and educational requirements which were hiring and transferring barriers, lower paying disproportionate black departments, and past official policies of segregation in the plant. The court found that the combination of all of these items made out a prima facie case of plant-wide discriminatory departmental assignment.

[52]. *E.g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 729 (5th Cir. 1976); *United States* v. *United States Steel*, 520 F.2d 1043 (5th Cir. 1975); *United States* v. *T.I.M.E.-D.C.*, 518 F.2d 299, 313 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1255 (5th Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 111-12 (5th Cir. 1975);*EEOC* v. *Detroit Edison*, 515 F.2d 301, 313 (6th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340

(8th Cir.), *as modified*, 526 F.2d 722 (1975); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372, 1376 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582, 593 (4th Cir. 1972); *United States* v. *Bethlehem Steel Co.*, 446 F.2d 652, 660-61 (2d Cir. 1970); *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

[13] *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1168 (5th Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1262 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 243 (5th Cir. 1974); *Bing* v. *Roadway Express, Inc. (Bing II)*, 485 F.2d 441 (5th Cir. 1973); *United States* v. *Georgia Power*, 474 F.2d 906 (5th Cir. 1973).

[14] The carry-over of antecedent seniority need not be granted to every employee; it is compelled only for victims of prior discrimination, dubbed by the courts to be members of the 'affected class.' Although the gravamen of an attack on the seniority forfeiture provision may be its inhibition of minority transfer, the affected class clearly includes those who already have transferred, incurring the loss, as well as those inhibited from transfer. On the other hand, the affected class is not necessarily that described by plaintiffs in the class action paragraph of their complaint nor does it extend to those hired after discrimination has ceased.

Stacy, Title VII Seniority Remedies in a Time of Economic Downtown, 28 Vand.L.Rev. 487, 496-97 (1975).

[15] *See, e.g.*, *Rodriquez* v. *East Texas Motor Freight*, 505 F.2d 50 (5th Cir. 1974), *cert. granted*, ___ U.S. ___, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974).

[16] *See, e.g.*, *EEOC* v. *Detroit Edison*, 515 F.2d 301, 316 (6th Cir. 1975); *United Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

[37] "Though this rule seems simple, it has been misapplied to foreclose class membership to blacks hired after the assignment of just one white to a previously all-black department. *E.g.*, *Johnson* v. *Goodyear Tire & Rubber Co.*, 349 F.Supp. 3, 16 (S.D.Tex.1972), *modified*, 491 F.2d 1364, 1374 (5th Cir. 1974)." Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 24 Vand.L.Rev. 487, 497 n. 73 (1975). *See Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1374 (5th Cir. 1974).

[38] *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1174 (5th Cir. 1976); *citing Stevenson* v. *International Paper Co.*, 516 F.2d 103, 112 (5th Cir. 1975) *and Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 248 n. 99 (5th Cir. 1974); *accord*, *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1355-56 *as modified*, 526 F.2d 722 (8th Cir. 1975); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 375-76 (8th Cir. 1973; *Long* v. *Georgia Kraft Co.*, 450 F.2d 557, 560 (5th Cir. 1971); *United States* v. *Bethlehem Steel*, 446 F.2d 652, 659 (2d Cir. 1970).

[39] *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 112 (5th Cir. 1975):

> We do not hold as a matter of law that there should always be . . . red circling . . . . The requirement for and feasibility of the remedy turn on factual matters.

[40] If the district judge chooses to credit all testimony, the present record indicates that some discriminatees might initially suffer reduced wages by transferring to another department. Whether this reduced wage phenomenon would be the result of a departmental reduction in force is not clear from the record. We intimate no view as to the proper resolution of this issue.

[41] The following are the other reasons given by the district court: (1) There are no lines of promotion or residence requirements to impede promotion in new departments. (2) Frequent manpower fluctuations may create new opportunities. (3) Some of these manpower fluctuations will obviate old wage rates. (4) No training is provided for new jobs.

[42] By company consent an after-the-fact notification process has begun.

[45] Word of mouth notification systems, at least for purposes of publicizing job vacancies, have been alluded to as being inherently prejudicial to blacks in majority white plants. *E.g.*, *United States* v. *Georgia Power*, 474 F.2d 906, 925 (5th Cir. 1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

[46] *Cf. Stevenson* v. *International Paper Co.*, 516 F.2d 103, 112-113 (5th Cir. 1975); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1174 (5th Cir. 1976).

> This reconsideration should not be limited to only considering the word of mouth notification system. It should also consider the recently instituted system of posting daily turn-over sheets, monitoring provided by union members, and notification provided by contract compliance officers. If any such system is to be instituted, the business necessity defense which was not reached by the court before, should be considered.

[47] In a footnote to its opinion the district court held one subclass was not entitled to backpay.

[48] *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1374 (5th Cir. 1974); *accord, Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 712-20 (7th Cir. 1969).

[49] "Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 1268, 47 L.Ed.2d 444 (1976).

[50] *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975); *Sabala* v. *Western Gillette Inc.*, 516 F.2d 1251, 1264 (5th Cir. 1975); *Gamble* v. *Birmingham So. R.R.*, 514 F.2d 678, 686 (5th Cir. 1975); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372, 1378 (5th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442-45 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 388 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 251-53 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974); *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023, 1028 (6th Cir.

1973); *United States* v. *Georgia Power*, 474 F.2d 906, 921 (5th Cir. 1973); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (5th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

[10] *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[11] Plaintiffs claim that some whites promoted to foremen had less formal education than some blacks who were not promoted.

[12] *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1192 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 117 (5th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1344, *as modified*, 526 F.2d 722 (8th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 59 (5th Cir. 1974), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 249 (5th Cir. 1974); *Rowe* v. *General Motors*, 457 F.2d 348, 358 (5th Cir. 1972).

[13] We note in this regard that the use of subjective promotion criteria by mostly white foremen has been held to be a ready mechanism for racial discrimination in promotion. *Rowe* v. *General Motors*, 457 F.2d 348, 358-59 (5th Cir. 1972); *accord*, *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1192-93 (5th Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 241 (5th Cir. 1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 367-68 (8th Cir. 1973).

APPENDIX C

SWINT v. PULLMAN-STANDARD

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, a Division of Pullman, Inc., et al., No. CA 71-P-0995-S, July 5, 1977

CIVIL RIGHTS ACT OF 1964

1. Seniority — Departmental seniority system ► 108.3315

Employer's departmental seniority system, which was adopted and has been maintained free of racial purposes, which is neutral in form and consistent with industry practice, and which has been uniformly followed for all employees regardless of race, is valid under Section 703(h) of Civil Rights Act of 1964, even though seniority system perpetuates effects of employer's pre-Act racially discriminatory assignment policy.

2. Racial discrimination — Job assignments ► 108.3115

Employer that discriminated on basis of race in assigning jobs before enactment of Title VII did not violate Act by its assignment policy after 1966, despite variations for each of years 1967 through 1973 in racial composition of its departments beyond that expected from random, "colorblind" selection, since (1) racial make-up of departments was attributable to pre-Act discrimination, (2) employer's post-1966 assignments indicate that it was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white or predominantly-white departments, and (3) finding of pre-Act discriminatory assignments does not compel circumstantially a finding that such assignments were made during time period involved in present action.

3. Racial discrimination — Selection of supervisors — Bona fide occupational qualification ► 108.3178

Employer's requirement that salaried supervisors be selected from employees who served satisfactorily as temporary foremen, which requirement existed both before and after blacks became appointed as temporary foremen, is bona fide occupational qualification, and employer did not violate Title VII by its appointments to supervisory positions, where number of blacks appointed to such positions is less than two standard deviations from number expected from composition of temporary foremen for relevant period, and employer made earnest efforts to promote blacks into supervisory level.

4. Racial discrimination — Promotion ► 108.3178

Employer did not discriminate against black employees in its selection of employees for position of temporary foreman, even though each selection was limited to employees working in department in which temporary foreman position occurred, where difference between percent of total offers actually made to black employees and percent of offers that would be expected in absence of discrimination is less than two standard deviations.

5. Racial discrimination — Promotion ► 108.3178

Employer that selected only employees in welding department with adequate skills and experience for position of temporary foreman did not discriminate against blacks, despite "under-appointment" of 11 blacks to that position, since a large number of promotions were made at time when black welders had only a few months of experience and did not possess skills needed to act as foreman despite employer's active efforts to seek out and train blacks to be welders.

6. Racial discrimination — Experience requirement ► 108.3045

Employer did not discriminate against blacks by its requirement that employees seeking to become welders demonstrate either training or outside experience, where this valid requirement, which was not put in until black employees were given opportunity to demonstrate their skills as welders, was intended to prevent on-the-job training of unqualified white employees.

On remand from the U.S. Court of Appeals for the Fifth Circuit (13 FEP Cases 604, 539 F.2d 77). Judgment for employer and union.

See also 11 FEP Cases 943.

U. W. Clemon (Adams, Baker & Clemon), Birmingham, Ala., for plaintiffs.

C. V. Stelzenmuller and D. Frank Davis (Thomas, Taliaferro, Forman, Burr & Murray), Birmingham, Ala., for defendant employer.

John C. Falkenberry (Cooper, Mitch & Crawford), Birmingham, Ala., for union defendants.

Full Text of Opinion

SAM C. POINTER, Jr., District Judge: — On September 13, 1974, this court denied the plaintiffs' several claims of racial discrimination. 8 EDP ¶9720, 11 FEP Cases 943. On August 30, 1976, the Fifth Circuit remanded the case for further proceedings with respect to two issues — the seniority system and the selection of supervisors. 539 F.2d 77, 13 FEP Cases 604.[1] On February 22-23, 1977, after conferences and further pretrial briefing, additional evidence was taken and the case resubmit-

---

[1]All footnotes for this section appear at the end of this Appendix, pp. A-119-A-123.

ted. Final decision was delayed in anticipation of potentially relevant Supreme Court cases, which, as it turned out, are indeed of critical significance in the case sub judice.[2] See International Brotherhood of Teamsters v. U.S., — U.S. — , 45 LW 4506, 14 FEP Cases 1514 (May 13, 1977); United Air Lines, Inc. v. Evans, — U.S. — , 45 LW 4566, 14 FEP Cases 1510 (May 31, 1977).

I. Seniority System

This court had found Pullman's departmental seniority system not to be in violation of Title VII, basing its decision in large part upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignments to most of the departments.[3] The Fifth Circuit directed that this finding be reconsidered, emphasizing that past discrimination in assignments could be established, at least as a part of plaintiffs' *prima facie* case, without regard to the relative desirability of those departments — i.e., that in employment situations, as with schools, there is no "separate but equal" doctrine. The Circuit also reviewed in depth the procedures to be followed under existing precedents should, on such reconsideration, the trial court determine that a *prima facie* case of discriminatory assignments was shown.

In the initial trial court decision and on the appellate review, principal attention was focused upon the extent, if any, to which there had been shown discrimination in departmental assignments prior to June 1965. It was sufficient to look to such a time period because it provided the evidence most favorable to plaintiffs' claims of discriminatory assignments and because, under the then state of the law, a violation of Title VII was considered proved by showing a seniority system which perpetuated the effects of discriminatory assignments which pre-dated Title VII.

The Supreme Court decisions in the Teamsters and United Air Lines cases require, however, this court to place primary[4] attention upon a later period of time — starting ninety days before the filing of the first EEOC charge reasonably related thereto. These cases, in conjunction with the Franks case, teach that a "valid" seniority system does not violate Title VII even if it perpetuates the effects of past discrimination, although such a system may have to yield, subject to considerations of equity, to remedial measures ordered for persons injured by discriminatory acts timely challenged and pursued under Title VII. Looking to the earliest related EEOC charge,[5] what this means is that the court must, if it determines that the seniority system was "valid", also determine whether and to what extent there were discriminatory assignments to departments on and after December 27, 1966.[6] Evidence of discriminatory assignments prior to June 1965 or, indeed, prior to 1967, no longer forms the basis for the plaintiffs' claims, but is now useful only for its circumstantial value.

[INITIAL INQUIRY]

[1] An initial inquiry is whether the seniority system at Pullman is "valid" — a word chosen by this court to encompass the several requirements imposed by statute and viable judicial precedents. As was implicit in its original opinion but is now made explicit, the court finds — subject only to the implications of the 1972 changes — that the seniority system was adopted[7] and has been maintained[8] free of any racial purposes; that it is neutral in form, applying equally to all; that it is consistent with industry practice and, particularly for a company with the operational characteristics of Pullman, quite rational; and that it has been uniformly followed for all, regardless of race.[9]

The one qualification to the foregoing stems from the 1972 changes to the seniority rules under the Department of Labor agreement. For the purpose of correcting possible past

discrimination, blacks hired before June 1965 were given special seniority benefits, detailed in this court's original opinion. To the extent of those changes, Pullman has seniority rules which are purposefully discriminatory — in favor of affected blacks — and which are not neutral at all. In the context of this case, the court finds it unnecessary to wrestle with the "reverse discrimination" problem raised thereby.[10] Suffice it to say, that the court finds that the seniority system does not discriminate against blacks and, at least on an attack made by blacks, is "valid" under 42 U.S.C.A. § 2000e-2(h).

[2] For the plaintiffs to prevail on this issue, therefore, they must establish that there were discriminatory departmental assignments after December 27, 1966. One method of proof, approved in the Teamsters case, is by comparing the racial composition of departments with each other and with applicable census information.[11] And, in the present case, exhibits PX 24-30 certainly do reflect that for each of the years 1967 through 1973 there were variations in the racial composition of the departments beyond that expected from random, "colorblind", selection. However, the law recognizes the reality of the situation; namely, that departments are not reshuffled anew each year but are rather, the result of past assignments as well as new ones.[12] Hence, as noted in Teamsters, an employer can overcome the *prima facie* effect of such statistics by showing that "the claimed discriminatory pattern is a product of pre-Act [assignments] rather than unlawful post-Act discrimination." 45 LW at 4515, 14 FEP Cases at 1529. Here, the evidence shows that the somewhat disparate compositions of the departments in the post-1966 period were attributable to the assignments made prior to Title VII, as covered in great detail in this court's prior opinion and in the Fifth Circuit's decision. Indeed, these very exhibits reflect that the extent of departmental variations from the overall work force composition was being reduced each succeeding year during the critical time period.

[ASSIGNMENT POLICIES]

It is, moreover, possible under the evidence in the case to directly examine the assignment policies of Pullman during the critical years, for one can derive from the records introduced the individual assignments that were made, and there is much information about how these decisions were made. While not reproduced here, the court has made a chart showing, for each year starting June 1966, the number of individuals, by race, assigned to each of the 28 departments. These statistics give rise to no inference that assignments were being made to further a policy of segregated or racially-imbalanced departments. Indeed, if anything the reverse is true: the post-1966 assignments indicate that the company was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white or predominantly-white ones. The evidence reflects, moreover, no specific instances of discriminatory assignments during the post-1966 period and, to the contrary, a policy of actively attempting to get blacks into the formerly all-white jobs, which by and large were the "better" jobs. In Teamsters, the statistical data gave rise to an inference of discrimination, a conclusion "bolstered" by evidence of specific employment practices; here, the statistics for the period in issue give rise to the contrary inference, a conclusion abundantly supported by the other evidence in the case.

To what extent was there a policy of discriminatory departmental assignments in earlier years? An answer to this question would have been critical to the plaintiffs' claims prior to the recent Supreme Court decisions, and still may be of circumstantial value. The court has carefully reevaluated the evidence in the light of the principles indicated by the Fifth Circuit and does indeed find that there was, prior to March 1965, a policy of discrimination in such assignments which affected not just the nine departments dealt with in the Department of Labor agree-

ment, but indeed, in varying degrees, virtually every department — to the extent that it must be viewed as a plant-wide policy. This conclusion is based not so much on the statistical data, which, as recognized by the Fifth Circuit, is certainly susceptible of different interpretations, as it is upon the implications of the former practice of informally "segregating" most of the jobs at Pullman. The segregation of jobs prior to March 1965 — which certainly must be taken as an employment practice and policy, whether or not ever formally approved by company and union — meant that departmental assignments were likewise dependent upon the nature of the jobs where vacancies existed. If all the jobs of a department were "consigned" to employees of the same race, the department was, of course, totally segregated and departmental assignments were likewise racially determined. But even in mixed departments whose racial composition approximated that of the plant as a whole, the assignments were dependent upon whether particular job openings were for a white or black position, rather than a "mixed" one. What the court is saying is that there was a plant-wide policy of making assignments to departments based on race — not as a policy to segregate departments, but as a means to carry out the plant-wide practice of job segregation.[13]

[ARBITRATION DECISION]

The practice of job segregation was however upset by an arbitration decision in March 1965 dealing with Rivet Drivers, and over a period of the next several months, prompted in part by the advent of Title VII, it was discarded throughout the plant. Of course, it took some time before the residue of that former practice had essentially been eradicated.[14] The point is that, with the demise of the segregated job practice, so also went the ancillary practice of making departmental assignments based on race. Accordingly, the finding of pre-Act discriminatory assignments does not compel circumstantially a finding that such assignments were made during the period involved in this

lawsuit. It is clear that by December 1966 the company was no longer making assignments to departments based on race — except, that is, to the extent of attempting to rectify imbalances caused by its earlier discriminatory practices — and that the plaintiffs have therefore failed to establish an essential element of their claim.

In its original decision this court had concluded that the company did not immediately abandon its discriminatory assignment policies respecting six of the nine departments involved in the OFCC agreement. The court instead used as a cutoff — for purposes of determining which black employees should have the benefits under that agreement — the dates on which the first white achieved some permanent status in a formerly all-black department or on which the first black obtained such status in a formerly all-white department. Having been directed to reconsider this entire question, the court concludes that its original decision, based largely upon a mechanical application of statistical data respecting a few departments, was incorrect. It concludes, consistent with the remainder of this opinion and upon a reevaluation of the evidence in its totality, that there was not a policy of discriminatory assignments respecting these six departments after 1966 anymore than there was respecting the other departments.

It is perhaps useful to look at the assignments after December 1966 to these six formerly one-race departments. Respecting the three formerly all-white departments: in the Air Brake Department, while the next vacancy (in 1970) was filled by a white, blacks had been tried in the department in 1965 and in 1966, and in 1971 two blacks were assigned to it; in the Inspection Department, while three whites were assigned to it in the 1967-70 period, a black had been tried there in 1967 and two blacks had declined assignment to it in 1969, and indeed six of the 10 inspectors with post-April 1965 seniority dates are black; and in the Plant Protection Department the first vacancy filled after

December 1966 was by a black. Insofar as the formerly all-black departments are concerned, the first vacancy in the Janitor Department after December 1966 was filled by a white; the second vacancy in the Die and Tool Department after that date was filled by a white (and post-Act assignments to the department have more frequently been of whites than of blacks); and in the Truck Department two of the first five vacancies were filled by whites and through the date of trial more whites than blacks were hired into that department. In the other three departments covered by the OFCC agreement, the first vacancies occurring after April 1965 were filled by workers of a race different from the prevailing racial identiy of those departments, dramatizing the change of policy that had taken place.

[IAM DEPARTMENTS]

Special concern was raised in the Fifth Circuit decision as the situation respecting the two formerly all-white IAM departments, a matter which had not been covered in detail in the original decision. The first post-1966 assignments to the Machinist Department (IAM) were three blacks and four whites. The Die & Tool Department (IAM), six blacks and one white were assigned in 1966 and over the next four years seven other blacks and eight whites were assigned to it. The court is convinced that with respect to these departments, as with the other twenty-six departments, there was no policy or practice of discriminatory assignments after December 1966.

Having found that during the applicable time period there was no policy or practice of discriminatory department assignments to any of Pullman's departments, the court is not called upon to treat the relief-oriented issues described by the Fifth Circuit, such as "red circling" and "posting". The court furthermore vacates that part of its earlier decision which had expanded the rights given blacks under the OFCC agreement and which had provided a means for certain blacks to present

back pay claims respecting the effect of the department seniority system upon their prior assignments. It will not therefore be necessary for the court to determine, under teamsters, whether claimants for back pay who did not request assignment or transfer to particular departments would have done so but for knowledge of some contrary company policy — a matter which would be most difficult of proof under the facts of this case showing active efforts by the company to correct past imbalances.

II. Selection of Superivsors

This court had found that plaintiffs failed to make a *prima facie* showing of discrimination in the selecion of supervisors, basing its ruling in part upon two factors which the Fifth Circuit concluded were impermissible under the circumstances.[13] The evidence from the original trial is now due to be reconsidered in conjunction with the additional evidence presented after remand.

At the time of trial only some 10% of Pullman's salaried foremen were black, a figure which is substantially below that expected from the labor market — which ranges from 25 to 35% black, depending on the age group and area selected — or from Pullman's own work force — which ranges from approximately 45 to almost 50% black, depending upon the time selected. As Teamsters indicates, however, such statistics may be the result of the pre-Act discrimination and hence may be "rebutted" by data pertinent to the employment decisions made during the period covered under the EEOC charge. A summary of these promotions is given below:

Years	Promotions	Blacks
1967-68	17	2 (12%)
1969-70	18	4 (22%)
1971-72	8	2 (25%)
1973-mid '74	20	6 (30%)
mid '74-Jan. 77	12	4 (33%)
	75	18 (24%)

While these figures would compare favorably to expectations from the area labor market, at least after the first few years, such a comparison would be inappropriate. Likewise, a comparison with Pullman's total work force — showing a substantial disparity — would also be inappropriate. As Hazelwood School District v. United States, —— U.S. ——, 45 LW 4882, 15 FEP Cases 10 (June 27, 1977), makes clear, the group selected for comparison should be one which, when special qualifications are needed to fill particular jobs, possesses those qualifications.

[LIMITATION]

[3] It is clear from the evidence, if not from common sense, that special skills are needed by supervisors and that — to paraphrase another Supreme Court decision[14] — all workers are not "fungible" when it comes to selection of supervisors. The long-standing practice at Pullman has been to select salaried supervisors from the ranks of those who have demonstrated their abilities as front-line supervisors, i.e., as temporary foremen. This limitation, imposed by Pullman both before and after blacks became appointed as temporary foremen, is found by the court to be a bona fide occupational qualification under the evidence in this case. It moreover provides — subject to consideration of whether promotions to temporary foremen have

temporary foremen themselves been discriminatory against blacks — the appropriate group to which comparisons should be made under Hazelwood School District.

The opinion in Hazelwood School District, fn. 17, suggests the usefulness of the standard deviation as a measure of predicted fluctuations, citing the methodology employed in Castaneda v. Partida, —— U.S. ——, 45 LW 4302, 4306, n. 17. (March 23, 1977). When such a caiculation is here made, it is found that the number of blacks appointed to salaried supervisory positions is less than two standard deviations from the number expected from the composition of temporary foremen for the period. Indeed for the latter eight years, the number of blacks so promoted is higher — though not statistically significant at $p < .05$ — than what was expected from the selection group. Certainly when taken in conjunction with evidence of a non-statistical nature as to the company's active and earnest efforts to promote blacks into the supervisory level — which are not mere "simple protestations" of a denial of discrimination" — it is clear, and the court so finds, that plaintiffs; *prima facie* showing with respect to salaried supervisors has been rebutted and that Pullman did not discriminate against blacks in such promotions in the time frame covered by the EEOC charges.

What about the promotions to temporary foreman, the practice by which Pullman has long met its sporadic needs for front-line supervision? The summaries presented by the company, DX-351 and DX-361, reflect that for the four most recent years the percentage of such promotions made to blacks has been some 31%. Here again, it is necessary to determine the group — or groups — to which the ratio of black promotions should be compared.

As was true with salaried foremen, it would be inappropriate to make a comparison to figures for the area labor market, a comparison which would give rise to no inference of racial

discrimination. And at first glance it would seem that a comparison could properly be made to the total work force at Pullman, which is 45-50% black. But that too, on analysis, would be inappropriate.

Promotions of temporary foremen are departmental in all essential aspects. They are made according to the needs of the individual departments. They are made by the supervisory personnel in that department. They are made from the employees working in that department.[18] The only involvement in the process by non-departmental personnel is the regular review by the Contract Compliance Officers — one black and one white — to assure that racial discrimination has not occurred.

[DEPARTMENTAL ANALYSIS]

The restriction of such temporary promotions to persons working in the department is a bona fide occupation qualification, justified by business necessity, under the evidence in this case. It is most appropriate in this case to analyze the temporary promotions on a departmental basis and to base expectancies on the composition of workers within the department. From the evidence in this case, principally DX-282 and DX-334[19], it is possible, as the court has done, to tabulate the departmental promotions, the blacks actually appointed, and the number of expected black appointments.

Promotions to Temporary Foreman
1967 through May 1974

Department	Promotions	Blacks	
		(exp.)	observed
Air Brake Pipe	3	(0)	0
Boiler House	0	(0)	0
Die and Tool, IAM	33	(1)	0
Die and Tool, CIO	0	(0)	0
Forge	6	(2)	1
Inspection	5	(0)	0
Janitors	0	(0)	0
Lumber Stores	0	(0)	0
Maintenance, IAM	17	(2)	0
Maintenance, CIO	47	(9)	13
Misc. Stores	12	(6)	5
Mobile Crane	0	(0)	0
Paint and Shipping	27	(14)	16
Plant Protection	0	(0)	0
Power House	0	(0)	0
Press	2	(1)	0
Punch and Shear	8	(6)	3
Railroad	6	(2)	1
Steel Construction	12	(9)	11
Steel Erection	57	(41)	41
Steel Misc.	36	(32)	29
Steel Stores	27	(20)	15
Template	3	(0)	0
Truck	0	(0)	0
Welding	149	(22)	11
Wheel and Axle	4	(1)	0
Wood Erection	12	(7)	3
Wood Mill	0	(0)	0
	466	(175)	149

The calculation of the expected number of black promotions was done by multiplying the number of such promotions in a department during a given month (or quarter) by the percentage of blacks working in the department that month (or quarter), then adding the products so obtained over the 89 month period, and then rounding the sum to a whole number. As to the two largest departments — Welding and Steel Erection — the black percentage was determined in a slightly different manner: in the Welding Department, the figures were the black percentage of welders that month (or quarter); and in the Steel Erection Department, the figures were the percentage of blacks working that month (or quarter) who were qualified as either Riveters, Assemblers, or Heaters. This limitation was thought appropriate because it is clear—and the court so finds—that only Welders would be qualified to act as temporary foremen in the Welding Department and only persons with experience as a Riveter. Assembler or Heater would be qualified to act as temporary foremen in the Steel Erection Department.

Similar restrictions as to prerequisite jobs needed for promotion to temporary foreman could be determined for many of the other departments. For example, it is clear that only a full Millwright has the necessary qualifications to be temporary foreman in the Maintenance (IAM) Department: and, if such a restriction had been utilized, the chart would have reflected no expected black promotions (rather than the two shown). The court's study of the departments, while not attempting to fix the actual number, does indicate that the expected number of black promotions shown on the chart is overstated and is closer to the actual number of black promotions.

[REJECTIONS]

[4] As was noted in the earlier decision, a greater number of blacks than whites have turned down offers of such promotions. The data on these refusals available to the court — for the

1971-73 period — can be used to make rough projections for the entire period.[20] The indications, is that, for every 30 whites who accepted, 32 would have been offered the promotion and that, for every 30 blacks who accepted, 36 would have been offered the promotion. When a chart such as that shown above is constructed using the projected number of offers of promotion, it shows that some 35% of the total offers would presumably have been made to blacks, in comparison to the expected figure of 38% — a difference of less than two standard deviations.

The greatest difference between observed and expected results shown on the chart — both in absolute numbers and standard deviations — is in the Welding Department, where there is an "under-appointment" of 11 blacks, or some 2.54 standard deviations from the expected result. And, indeed, exclusive of the figures for the Welding Department, the overall actual appointments of blacks (and not merely the projected job offers, as described in the preceding paragraph) would be less than two standard deviations from the expected number. Inquiry must certainly be made whether as to the Welding Department case of "liability" has been established respecting such promotions — i.e., such as would create a presumption of discrimination in favor of individual class members in the department, subject to additional proof as a "second" phase of the case.

[5-6] A major reason for the large disparity in promotions in the Welding Department is that during the first two years of the period involved — 1967 and 1968 — there were 24 such promotions and not a single black was selected. The problem was that the black welders had only a few months of experience as welders and did not possess the skills needed to act as foremen in the Welding Department. Nor was this the result of any post-Act discrimination against them — rather, as indicated in the prior decision, the company has during the applicable time period actively sought and trained blacks to be welders and — to prevent employment of unqualified welders, black or white — has adopted procedures to verify qualificatilns.[21]

[REBUTTAL BY EMPLOYER]

The restriction of temporary foremen in the Welding Department to those with adequate skills and experience — and who were willing to accept such appointments[22] — was a bona fide occupational requirement for such promotions and was shown to be justified by business necessity. As Teamsters makes clear, a company is not limited in the "liability" phase of a case merely to statistical evidence. See 45 LW at 4515, n. 46, 14 FEP Cases at 1529. Here the company not only has countered the plaintiffs' *prima facie* showing with other statistical evidence, undercutting inferences drawn from plaintiffs' statistics, but perhaps even more importantly has provided non-statistical information as to its promotion of black welders to temporary foreman positions, both as to its general policies and as to individual decisions. The active efforts to upgrade blacks in the Welding Department, both to welder positions and to temporary foreman, together with the regular reviews undertaken by the Contract Compliance Officers to assure lack of discrimination and to encourage black promotions, are not mere window-dressing. When both the statistical data, fairly evaluated, and the non-statistical evidence are fairly considered, the court is convinced, and so finds, that the plaintiffs' *prima facie* showing of discrimination in promotion of temporary foremen in the Welding Department has been rebutted and that no such discriminatory practice existed subsequent to 1966. The same finding is made with respect to promotion of temporary foreman in the other departments.[23]

III. Summary

The court finds and concludes that the company did not in violation of the anti-discrimination laws follow any practice or policy after 1966 which discriminated against blacks in the assignment of employees to departments or in the selection of supervisory personnel. Nor has any violation of such laws been

shown to have been committed by the unions. Judgment is due to be entered in favor of the defendants as to all issues in this case.

Judgment

In accordance with the findings of fact and conclusions of law contained in the Memorandum of Opinion filed concurrently herewith, judgment is hereby entered in favor of the defendants. Each party shall bear its own costs.

Appendix C - Footnotes

[1] The Appellate court affirmed this court's rulings (a) that there had not been shown discrimination in the assignment of work among employees working the same job class; (b) that the failure to post job vacancies had neither discriminated nor perpetuated the effects of past discrimination; and (c) that the individual claims of discrimination by the plaintiffs had not been established. While the Fifth Circuit affirmed the ruling respecting "posting", it however held that the court should reconsider the question in the light of whether such relief was required to make efficacious the transfer rights of any who had been discriminated against.

[2] A third decision announced by the Supreme Court on the same day should also be noted. The body of the opinion in East Texas Motor Freight System, Inc. v. Rodriguez, — U.S. —, 45 LW 4524, 14 FEP Cases 1505, indicates that the instant case should not have proceeded as a class action at all. However, this case was certified before trial as a class action, was tried as a class action, and involved representative plaintiffs who had not at the time lost their individual claims. As footnote 12 of the Rodriguez opinion suggests, such facts make this case distinguishable from that in Rodriguez. Also see Franks v. Bowman Transportation Co., 424 U.S. 747, 752-57, 12 FEP Cases 549, 551-553 (1976).

[3] While finding that there had been past discrimination in assignments to nine departments, the trial court concluded that, in view of transfer opportunities given blacks in 1972, the effects thereof were not being perpetuated by the seniority system.

[4] Evidenced as the practices prior to the effective date of Title VII or not the subject of timely EEOC charges would, of course, still be relevant *circumstantially* as to the practices challenged by timely EEOC charges.

[5] So far as the court has been able to determine from the evidence, the first EEOC charge against Pullman was one filed by a Commissioner in January, 1967. This charge, however, was limited to the alleged practice of segregated facilities and, even with liberal rules of interpretation, could hardly be held reasonably related to attacks on departmental or job assignments or on the seniority system. The next charge, also by a Commissioner, was filed on March 27, 1967, and, by questioning the hiring and promotion practices of Pullman, is susceptible to the interpretation that it related also to assignment and transfer matters. Actually it is doubtful that this Commissioner's charge should be used as a date-designator since the instant private

lawsuit grew out of later filed individual charges. The earliest charge filed by one of the plaintiffs, on October 15, 1969, did not raise challenges to the assignment, transfer, or seniority policies, although it was amended on several occasions prior to the issuance of the right-to-sue letter. The first private charge directly bringing into question the company's assignment policies was apparently filed on May 11, 1970. To give plaintiffs' the benefit of the doubt, the court has in this opinion used the earliest possible date, i.e., 90 days before the March 27, 1967, Commissioner's charge, while nevertheless having substantial reservations that such a date is proper.

[6] Read literally, the issue specified in the pretrial order — whether the seniority system perpetuates the effects of past discriminatory departmental assignments — would not under the recent Supreme Court decisions state a material issue under Title VII. However since this implicitly assumed as an issue whether there had been discriminatory assignments, it adequately indicated the issue which this court must now resolve and, indeed, abundant evidence was presented at the trial as to the employment practices of the company up to the time of trial itself.

[7] Discrimination against blacks, a reality for many years at Pullman prior to Title VII, was accomplished through the vehicle of reserving many of the "better" jobs for whites. The departmental seniority system was not adopted with the intent or purpose of protecting whites against blacks.

[8] Illustrative of this conclusion is the fact that on a relatively recent vote by the union — approximately half of whose members are black — opposition to a merger of several departments for seniority purposes was unanimous.

[9] Of course there have been the typical disputes processed through the grievance procedures claiming that the company deviated from the seniority rules. As noted in the original opinion, fn. 24, the plaintiffs have not actively contended that the rules have been discriminatorily applied.

[10] The problem is compounded by the fact that the 1972 changes give remedial relief to blacks whose mistreatment, pre-dating Title VII, was not a legal wrong.

[11] Unlike Teamsters, the present case does not involve any claim of discrimination in the initial hiring decisions, and for good reason. See 539 F.2d at 83, n. 10, 13 FEP Cases at 608. Reference to census data is of doubtful value to the case at hand.

[13] Also see 539 F.2d at 94, n. 40, 13 FEP Cases at 618 (*prima facie* case not established merely by proving some departments do not approximate racial makeup of plant).

[14] In so ruling, the court is not however saying that racial considerations were the sole determinant of assignments. The court rather is impressed, particularly in view of the evidence presented by the company after remand, that bona fide job qualifications played the decisive role in assignments to many of the key jobs and departments — that, for example, whites were assigned as welders and to craft jobs because, with only very rare exception, no black hires possessed the requisite experience and skills for those jobs. There were, however, a few such exceptions, where aparently qualified blacks were denied assignment for what the court must conclude was in furtherance of the job-segregation practice — and, though few in number, such persons should have the benefit of a presumption of liability *if* they had cognizable claims (which they do not, under Teamsters) under Title VII. The co-existence of a non-discriminatory reason for the majority of assignments (the lack of qualifications) would not, in short, have destroyed the plaintiff's *prima facie* showing on behalf of the class, but would rather have constituted defensive matter to be shown in responding to individual class members' claims at subsequent hearings.

[15] See the section entitled "Segregation Claims" in the initial decision, 8 EDP at p. 5989, 11 FEP Cases at pp. 951-952. It is here appropriate to respond to the Fifth Circuit's comment that, in dealing with the lag time involved for blacks to exercise the rights afforded by opening jobs to them, the district court had "inexplicably discussed completely different figures from those shown in the record." See 539 F.2d at 96. 13 FEP Cases at 620. This court had, in its footnote 31, stated that "the 1973 study by plaintiffs showed that 19.9% of the whites held positions on the roster above JC 10, as compared with only 12.2% of the blacks." and the Fifth Circuit in its opinion said, "plaintiffs' exhibits show that in 1973 74.1% of blacks still remained assigned to job classes lower than 8 while 80.7% of all whites were assigned to job classes over 10." This court did make an error of addition from PX-55, erroneously calculating the number of whites above JC 10 as being 150, when the correct number was 160, and the corresponding division should have been 21.2% rather than 19.9%. Its calculation of the percentage of blacks in such positions, 12.2%, was correct. Actually, the Fifth Circuit made a greater miscalculation, for the percentage of whites assigned to job classes over 10 was not 80.7% but rather the 21.2%.

[15] This court considered plaintiffs' statistics deficient in failing to take account (a) of the higher rate of functional illiteracy among black employees and (b) of the time required for blacks, previously discriminated against, to obtain skills useful to supervisors. The Fifth Circuit held that these two factors would be pertinent in evaluating the statistics only if, *inter alia*, the court found that literacy and acquisition of the job skills were bona fide occupational qualifications — a finding which this court had not made.

[16] See Mayor v. Educational Equality League, 415 U.S. 605, 620(1974).

[17] Cf. Castaneda v. Partida, 45 LW at 4306, n.19.

[18] Of the 415 monthly promotions reported from January 1969 through May 1974, 403 — or 97% — were appointments of a person then in the department. Of the 13 "inter-departmental" temporary promotions, virtualy all involved an assignment to closely related work, e.g., an Inspector to the department in which he performed his duties or an Assembler from one department being assigned as foreman for assembly work in another department.

[19] DX-282 details the department promotions by month from January 1969 through May 1974. DX-334 provides the essential information on a quarterly basis back to January 1967.

[20] Prior to 1971 the turn-down rate by blacks was higher, and subsequent to 1972 the rate was probably lower. The 1971-73 figures should be reasonable approximation for the period as a whole.

[21] Plaintiffs assert that the requirement of either training or outside experience was a barrier designed to deter blacks. The court is persuaded that, to the contrary, it was both a valid requirement and was indeed intended to rpevent on-the-job training of unqualified whites. The requirement was not put in until black employees were given an opportunity to demonstrate their skills as welders.

[22] Turn-downs by blacks in the welding department were a significant factor.

[23] This is not to say that at no time has any black been the victim of discrimination in the selection of temporary foremen. On some isolated occasion — although the court was not shown this in the evidence — there may have been such an incident. For the plaintiffs to prevail at the "liability" phase of the case, thereby creating a presumption of discrimination with respect to individual class

members, there must however be established a policy of practice of discrimination. It may be noted that general notice of the trial of the case was given, with the invitation to class members to present evidence if they chose. It is unnecessary for the court to determine at this time whether an individual class member could, although unaided by any presumption of discrimination, still present by other litigation a claim of discrimination, for example, as to a supervisory position.

APPENDIX D

SWINT v. PULLMAN-STANDARD

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, A Division of Pullman Inc., et al., No. CA 71-P-0955-S, October 11, 1977

POINTER, District Judge: — By motions timely filed on July 15, 1977, plaintiffs seek to alter or amend the judgment of July 5, 1977, or, in the alternative, a new trial.

Plaintiffs first ask that the court produce the chart used by it in arriving at certain conclusions about departmental assignments and identify the source documents relied upon. As to the latter request, the information was simply that derived from the annual seniority lists themselves (PX-4 et seq.), looking to those new employees in each department who "survived" long enough to be listed on the succeeding June 1st roster. This is the same approach as was used in the original decision in reconstructing the June 1, 1965, seniority list. It is unnecessary for the court to reproduce the tabulation of such assignments by race, department, and year, as the same information is readily available in the exhibits on file.

Plaintiffs next assert that the court erroneously used a period of 90 days prior to filing of an EEOC charge as the commencement date for evaluating evidence concerning departmental assignments allegedly in violation of Title VII. The argument is that the 1972 amendment to Title VII, extending the time for filing charges to 180 days, has generally been given retroactive effect. See, e.g., Davis v. Valley Distributing Co., 522 F.2d 827, 10 FEP Cases 1473 (CA9 1975). Plaintiffs are probably correct. While this court's use of the 90-day period followed the opinion in United Air Lines Inc. v. Evans, 431 U.S. 553, 45 LW 4566, 14

FEP Cases 1510 (May 31, 1977), that case did not actually constitute a holding against retroactivity of the 1972 amendments. Evans rather involved a situation in which the charges would have been stale under either period of time.

As noted in the July 5th opinion at fn. 5, it is doubtful that plaintiffs can take advantage of the Commission-initiated charge of March 27, 1967. However, even if this be proper and if the plaintiffs have the benefit of a period of 180 days, the ultimate result stays the same. For the court nevertheless remains persuaded under the evidence that there was no practice of discriminatory assignments to departments after September 28, 1967, anymore than there was after December 27, 1967.

Plaintiffs argue that this court was prohibited by the mandate of the Fifth Circuit from reconsidering the question of whether there had been discriminatory assignments. To the contrary, however, it is clear that this court was in the remand order being directed to reevaluate from a new perspective whether racially discriminatory assignments had occurred, with this court to determine afresh the inferences that should be drawn from the evidence presented.

Finally, plaintiffs say that they should be given the opportunity to present additional evidence to demonstrate the invalidity of the seniority system in the light of International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 45 LW 4506, 14 FEP Cases 1514 (May 31, 1977).[1] This case was prepared for trial — as shown by the limitation of issues recited in this court's original opinion and in the appellate court's opinion — on the theory, then well recognized in this circuit, that a violation of Title VII could be shown by proof of a neutral seniority system which perpetuated the effects of pre-Act discrimination. Trial was conducted on such a limitation of issues, with consequent inattention by plaintiffs to possible evidence showing the seniority system to have been instituted or maintained contrary to Section 703(h) of the new Civil Rights Act of 1964.

---

[1]All footnotes for this section appear at the end of this Appendix, p. A-127.

Somewhat similar situations have been recently considered by the Fifth Circuit. In each it was held that the opportunity should be given for presentation of further evidence in the light of Teamsters. See Sabala v. Western Gillette, Inc., 559 F.2d 282, 15 FEP Cases 1809 (CA5 No. 74-2711); Sept. 16, 1977); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (CA5 No. 75-2176, at p. 6031; Sept. 19, 1977). The concern that a final decision affecting such important interests, including those of represented class members, be based upon the true facts — rather than upon those presented under what now appears to have been an erroneous interpretation of the law by all parties and by the court — leads this court to the conclusion that a new trial should be granted. The new trial will, of course, be for the limited purpose of receiving new evidence from plaintiffs and defendants upon the issue of the validity of the seniority system under Section 703(h) of the Civil Rights Act of 1964.

In making this ruling, the court would express the caveat that not all previously tried employment discrimination cases are due to be re-opened — that this particular case happens to be one which was under submission when Teamsters was decided and which had been tried at a particular point in time when all concerned acted under what, as it turned out, was an erroneous view of the law.

Order

In accordance with the accompanying Memorandum of Opinion, it is ordered that a new trial be granted, limited, however, to presentation of additional evidence relevant to the issue of the validity of the seniority system under Section 703(h) of the Civil Rights Act of 1964. The parties may proceed with further discovery as may be appropriate to that end.

Appendix D - Footnotes

---

[1] Plaintiffs say they were unaware that this court was withholding judgment in anticipation of the Teamsters case; and the court has no reason to doubt this, acknowledging that it did not tell the parties it was doing so. However, it should be noted that, in presence of plaintiffs' counsel, the court was requested by the defendant union to await the outcome of such decisions, with union's counsel at the time providing the court with a copy of the transcript of arguments made before the Supreme Court.

APPENDIX E

SWINT v. PULLMAN-STANDARD

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, et al., No. 71-P-0955-S, May 5, 1978

Full Text of Opinion

POINTER, District Judge: —

MEMORANDUM OF OPINION

(Pullman-Standard V)

An understanding of the issue now before the court — involving the validity of the seniority system at Pullman-Standard under Section 703(h) of the Civil Rights Act of 1964 — requires some consideration of the history of this litigation:

(1) Pullman-Standard I. In September 1974, following a sixteen day trial, this court held, with minor exceptions, against the plaintiffs' individual and class claims of discrimination. *Inter alia,* it found Pullman's departmental seniority system not violative of Title VII, basing that decision in large part upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignments to most of the departments. See 8 EPD ¶9720, 11 FEP Cases 943

(2) Pullman-Standard II. In August 1976, the Court of Appeals remanded the case for reconsideration on certain issues, including that relating to the attack on the seniority system. The court emphasized that discrimination in assignments could be established without regard to the relative desirability of the various departments — i.e., that

there is no "separate but equal" doctrine in employment situations. See 539 F.2d 77, 13 FEP Cases 604 (CA5 1976).

(3) Pullman-Standard III. In July 1977, after receiving additional evidence, this court again ruled against the plaintiffs' claims. While finding, under the standards outlined by the appellate court, that there had been discrimination in departmental assignments, it determined that such assignments had pre-dated the time period covered by EEOC charges. Concluding that the evidence had shown the seniority system to be valid under Section 703(h), the court found the claims barred under International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977). See 14 EPD ¶7815, 15 FEP Cases 144.

(4) Pullman-Standard IV. In October 1977, on timely motion by the plaintiffs, the court reopened the case for additional evidence relating to the validity of the seniority system under Section 703(h). See 15 EPD ¶7993, 15 FEP Cases 1638.

In January 1978 further evidence in the form of testimony *ore tenus,* depositions, interrogatories, and exhibits was presented to the court. The parties, having rested,[1] were then directed to file post-trial briefs.

A. Burden of Proof.

According to the company's brief, the plaintiffs have the burden of showing invalidity of the seniority system. In the sense that the plaintiffs had the burden of "going forward with the evidence" at the most recent hearing, this is certainly true; for at that time, based on the prior state of the evidence, both this court and the Fifth Circuit had adopted various findings supporting the validity of the seniority system.

---

[1]All footnotes for this section appear at the end of this Appendix, pp. A-149-A-152.

Imposition of the ultimate "burden of persuasion" is, however, another matter. The defendants could, with considerable logic, argue that Section 703(h) is interrelated with Section 703(a) in delineating an "unlawful employment practice", Frank v. Bowman Transportation Co., 424 U.S. 747, 758, 12 FEP Cases 549, 553 (1976), and that therefore the plaintiffs should have the burden of establishing inapplicability of Section 703(h).

[1] A contrary conclusion is here reached by the court — namely, that where the plaintiffs establish a disparate impact resulting from a seniority system (by reason of prior discriminatory practices), the defendants, as in the nature of an affirmative defense, have the burden to show that the seniority system in question was bona fide and that the differences caused thereunder were not the result of any intent to discriminate on the basis of race or color. The situation is analogous to that involving use of ability tests under this same Section 703(h), where the employer is held to have the burden to demonstrate applicability of the exclupatory provision of Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"); also see Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 10 FEP Cases 1181, 1190 (1975); Teamsters, supra, 431 U.S. at 360-61 n.46, 14 FEP Cases at 1529 (1977) ("the employer's burden is to provide a non-discriminatory explanation for the apparently discriminatory result").

B. Seniority System.

The seniority system under attack in this case has its essence in the 1954 company-wide collective bargaining agreement between Pullman and the United Steelworkers. Under that agree-

ment, seniority was measured by length of continuous service in a particular department — there were 26 such USW departments — and was exercised in the event of increases and decreases of forces in competition with all other employees in that department. There were no lines of promotion or progression in any department and, indeed, seniority — again, departmental age — was not formally recognized for promotional purposes until the 1956 agreement. Employees transferring from one department to another were treated as "new" employees in the department to which transferred (i.e., no carryover of seniority) and, with limited exception for those transferring at the request of the company or electing transfer in lieu of lay-off, also lost their seniority in the "old" department.

There is an additional component — not directly at issue in this litigation[3] — to the seniority system at the Bessemer plant; namely, the existence of two additional seniority units, or departments, represented by the International Association of Machinists and Aerospace Workers. Since 1944, the collective bargaining agreements with the IAM have provided for seniority based on length of service within the particular job classification in the seniority department, without opportunity for carryover of seniority in the event of transfer from other occupations or departments, whether represented by the IAM or not.

The seniority system in effect at Bessemer in 1954 remained virtually unchanged throughout the next eighteen years of collective bargaining between the company, the USW, and the IAM. Then, in 1972, as outlined in prior opinions, provision was made in an OFCC agreement to permit black employees hired before April 30, 1965, to transfer from predominantly black departments or to transfer to predominantly white departments, in either case with carryover of seniority. See Pullman-Standard II, 539 F.2d at 84 nn.15-16, 13 FEP Cases at 609 (CA5 1976). The restriction against carryover of seniority on departmental transfers continued in effect as to such black employees

when transferring from a "mixed" department to another "mixed" department, as well as to black employees hired after April 30, 1965, and to all white employees. Rate retention (or "red circling") is not afforded for any transferring employee.

For a number of years — until the arbitration decision in March 1965[3] — there was an informal custom at the plant of treating certain jobs as "white only" and others as "black only". This practice in turn, as has been previously found (see Pullman-Standard III), caused decisions respecting assignments to departments throughout the plant to be infected during that period with racial considerations. According to the plaintiffs, the effects of this discrimination in departmental assignments[4] have been perpetuated by the seniority system — a system which determines employment rights on the basis of departmental age and which, even with the 1972 changes, provides barriers to departmental transfers. The plaintiffs deny that the system meets the requirements of Section 703(h), taking issue with the company as to its bona fides and purposes. The applicable legal principles are those stated in Teamsters, supra, as explicated by the Fifth Circuit in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (1977).

(1) Neutrality of System.

One of the factors to be considered, as a part of the "totality of the circumstances in the development and maintenance of the system," is whether it operates to "discourage all employees equally from transferring between seniority units." James, supra, 559 F.2d at 352, 15 FEP Cases at 861. In the case *sub judice*, as in Teamsters, the seniority system — at least as it existed prior to 1972 — was facially neutral and, certainly with respect to the facets attacked (i.e., use of departmental age and loss of seniority on transfer), was applied equally to all races and ethnic groups. As this court noted in Pullman-Standard I — and subsequent evidence does not change the court's view — the

departmental seniority system was applied in a uniform manner, regardless of race or color, and the limited number of interdepartmental transfers granted were handled in a fair and non-discriminatory manner. 8 EPD at 5997 n.24, 11 FEP Cases at 949. While many of the grievances and other complaints made by blacks include charges of racial discrimination, these charges are not substantiated by the evidence. See, e.g., Pullman-Standard I, 8 EPD at 5998-99 nn.39, 41 & 50, 11 FEP Cases at 955-956, 958.

To the extent the system "locks" employees into a department and discourages transfers, it does so equally for both white and black — that is, it did so until 1972. Since the 1972 OFCC agreement, a substantial portion of the black employees are given favored treatment by being permitted to transfer their accumulated seniority from certain departments or into certain departments. The plaintiffs hardly have standing to challenge this solitary exception to the principles of neutrality found in the seniority system.

The Supreme Court noted in Teamsters, 431 U.S. at 356, 14 FEP Cases at 1527, that the overwhelming majority of employees discouraged from transferring to line-driver jobs were white. Emphasizing that fact, one might argue that a no-transfer seniority rule should be reviewed for its quantitative impact upon different groups of employees. Such an analysis may, indeed, be useful in the process of evaluating circumstantial evidence. If, to take an extreme example, a seniority rule were shown to penalize all blacks and no whites, the inference that the rule was racially motivated would seem compelled. Where, however, as here, a rule affects significant numbers of both white and black employees — and does so in an identical manner — it would be a misreading of Teamsters, in this court's view, to determine "neutrality" on the basis of its quantitative effects. Indeed, according to n.24 of the decision of the court of appeals in Teamsters, 517 F.2d 299, 312, 11 FEP Cases 66, 75

(CA5 1975), it appears that 95% of the non-white employees were affected by the rule precluding transfer to line-driver jobs, whereas only 59% of the whites were so affected. As noted in the Supreme Court opinion, 93% of the black and Spanish-surnamed American drivers were not line drivers, and only 38% of the white drivers were not line drivers. 431 U.S. at 342 n.23, 14 FEP Cases at 1521-1522. The reference by the Supreme Court to the numerical impact of the rule should be understood as providing additional support, and not as a *sine qua non,* for its decision — particularly since it apparently accepted the lower court's findings that non-whites had suffered the most from the rule. See 431 U.S. at 344, 349-50.

By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could however attempt to measure the relative effect of the no-transfer rule on white and black employees, i.e., to determine which group was the more discouraged from transferring. It may well be that a somewhat greater impact was felt by blacks than whites, although — as indicated in the chart considered in Pullman-Standard I for a somewhat different purpose and subsequently analyzed in Pullman-Standard II — this conclusion is by no means certain. In any event, the rationale of the Fifth Circuit in Pullman-Standard II indicates that such a study of relative economic desirability would be inappropriate. If one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite — equality or neutrality — without reference to such desirability. Under this approach, it is clear that the per-1972 no-transfer rule applied equally and uniformly to all employees, black and white, and that, given the approximately equal number of employees of the two groups, it was quantitatively neutral as well.

(2) Rationality of Seniority Units.

A second factor under Teamsters, is, in the words of the Fifth Circuit, "whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice)." James, supra, 559 F.2d at 352, 15 FEP Cases at 861. In so stating this factor, the appellate court seems to be suggesting that separate seniority units may be more acceptable if in the same bargaining unit than if in different bargaining units, in which latter situations one should make further inquiry as to rationality and industry practice. It is doubtful that such a proposition was intended by the circuit; at least there appears to be nothing in Teamsters to support such a principle, and it would logically seem that, if anything, greater scrutiny should be given to separate seniority units within the same bargaining unit than to ones in different bargaining units. It may well be that — in discussing the restriction against transfers to line-driver jobs as involving separate bargaining units, which was itself viewed as rational, in accord with industry practice, and consistent with NLRB precedents — the Supreme Court was not proposing a standard for Section 703(h), but was rather highlighting facts which demonstrated the bona fides of the seniority rule there in question.

In any event, this court is bound to follow the rulings of the Fifth Circuit. A solution — one which is in keeping with the admonition to use a "totality of circumstances" approach — is to inquire into rationality and industry practice not only when seniority units are in different bargaining units, but also when they are in the same bargaining unit.

[28 SENIORITY UNITS]

The division of the plant's work force into twenty-eight separate seniority units — 26 USW units and 2 IAM units — has remained essentially unchanged since 1954.[5] While this at first glance appears to be an unusually large number of departments,

it must be viewed in the context of the diversity of operations at the plant, the extreme fluctuations in employment levels,[6] and — what is particularly significant — the opportunity to use seniority within the unit for any job without the barrier of any lines of promotion. Given these facts, the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumping or displacements, highly inefficient performance, or excessive grievances over ability factors — or all of them.[7]

One can, of course, raise questions about particular units and can ask whether other configurations would, from the later perspective of the courtroom, make more sense. For example, the plaintiffs note that the Steel Miscellaneous department owes its separate existence — since 1952 — to no apparent reason other than the fact that, prior thereto, there were two work gangs in the Steel Stores department. Whether it is rational to have separate seniority units based upon the fact that the two groups worked under different foremen may be debated; but it should be noted that this separation came about as a result of collective bargaining at which blacks, as well as whites, were representing the union, and the two units created had roughly comparable racial compositions. On the other hand, while the company's apparently unilateral creation of a separate Inspection department in the late 1940's, drawing the inspectors from the various operating departments into a separate unit, can be seen as having a racial impact (all the inspectors were white)[8], this change was certainly rational — removing them from responsibility to the very persons whose production they were being called upon to inspect.

In context, and taken as a whole, the seniority units at Pullman's Bessemer plant constitute a rational structure. They are, moreover, consistent with practices which were at the time generally followed at other unionized plants throughout the

country, at other companies in the same industry, and indeed at Pullman plants located outside the South where race was presumably not a potential consideration.

As stated by the Supreme Court,

"In addition, there is not reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. *** The legislative history contains no suggestion that any one system was preferred."

Teamsters, supra, 431 U.S. at 355 n.41, 14 FEP Cases at 1527. Indeed, as the company has established — by publications of the Department of Labor, arbitration awards, decisions of the War Labor Board, various collective bargaining agreements, and contemporaneous studies made by it at the time of contract negotiations — seniority by departmental age such as found at Bessemer was the modal form of agreements generally, as well as with manufacturers of railroad equipment in particular.[9]

[OTHER PLANTS]

The number of separate departments found at Pullman's Bessemer plant is less than that (40 departments) at American Car and Foundry's plant at St. Charles, Missouri, and than that (29 departments) at Eastern Car Company's plant in Nova Scotia. The same number of departments (28) are found at Pullman's plant in Butler, where less than 1% of the employees were black; and the lesser number of departments found at Pullman's plant in Hammond, also having a small percentage of black employees, should be reviewed in the light of the more limited operations there conducted.[10]

There are, as would be expected, differences between the departmental configurations at Pullman's three plants; and some of these are emphasized by plaintiffs as indicating the existence of racial considerations at Bessemer.[11]

Plaintiffs note that the Truck, Wheel and Axle shops at Hammond are in a single department, while at Bessemer the Truck shop (which remained all-black until 1968-69) and the Wheel & Axle shop (racially mixed) are separate departments. Although any overlap of occupational titles in the two departments is insignificant, it may be - the evidence is not clear - that there is a sufficiently close relationship between the jobs in the shops that they could be in the same seniority unit, rather than in different ones. It should, however, be noted that the two shops were treated as separate departments before any unionization or seniority,[12] that they were certified by the NLRB for inclusion in separate representational units, [13] and that for a time they were covered under separate collective bargaining agreements with different unions. Moreover, when the company proposed merger of these and other departments, the proposal was unanimously rejected by the union at a meeting where the majority in attendance were black.[14]

Plaintiffs likewise complain that at Butler and Hammond there is a separate Electrical & Crane department, while at Bessemer cranemen are in more than one department. Here again, cranemen at Bessemer were not in a single department prior to unionization and seniority (indeed, they were in five separate departments), the electricians were certified by the NLRB to be in a different bargaining unit, and for a period of time the two groups were covered under separate collective bargaining contracts with different unions. When consideration was given in the 1950's to possible formation of an Electrical & Crane department at Bessemer, company officials at Butler advised against the practice based on their actual experience. Rejection by the company of union proposals to merge a small

seniority unit having some of the cranemen (the Mobile Crane department) into either the Railroad department or the Maintenance department appears to have been based on business considerations, not racial ones - for all three of the departments were racially mixed.

[FACET OF ATTACK]

A primary facet of plaintiffs' attack is their challenge to the two Die & Tool departments and the two Maintenance departments at Bessemer. No similar situation exists at Pullman's Butler and Hammond plants, and indeed there were no such divisions at Bessemer prior to unionization and seniority. The key here is that responsibility for this situation cannot properly be placed on either of the real defendants - the company or the USW - and that, moreover, this circumstance does not diminish the bona fides of the seniority system under attack - that between the company and the USW.

The existence of these divided departments is due to actions of the NLRB in 1941, when it - at the request of other petitioning unions - divided the plant into three representational units for election purposes. This was done over the opposition of the predecessors'' of the USW, which sought to represent all production and maintenance employees. The company properly adopted a "hands-off" attitude on formulation of election units. Three separate election units were formed by the NLRB, with the International Brotherhood of Electrical Workers gaining representation status (over the USW) for two small departments, with the IAM gaining representation (over the USW) for five other departments, and with the USW gaining representation (over the Federal Labor Union) for the bulk of the employees. The unit formed by the NLRB as to which the IAM gained recognition was one which included certain positions in the Die & Tool and Maintenance departments considered by the NLRB as involving craft and craft-related jobs, but which omit-

ted other positions in those departments, they being in the unit for which the USW gained recognition. Hence - and it is difficult to understand how the company and the USW could have legally done otherwise - it resulted that there were two Die & Tool seniority units, each subpart being represented by a different union. The separation into different bargaining units was not merely, as in Teamsters, "consistent with National Labor Relations Board precedents," 431 U.S. at 356, 14 FEP Cases at 1527; it was rather required by a specific decision of the NLRB and the outcome of the elections.

Much effort is expended by the plaintiffs to show that the NLRB erred in determining which occupations should and should not have been treated as craft and craft-related jobs and that the result of that decision was to create for a few years[16] all-white IBEW bargaining unit and to establish after a few years[17] an all-white IAM unit. The collateral attack on the NLRB decision by plaintiffs in this litigation, filed more than twenty-five years later, must fail, if for no other reasons, because the real defendants - the company and the USW - are not chargeable with responsibility for those events and because such matters do not impair the validity of the seniority system to which they did agree. If there was any industry practice to combine positions represented by different unions into the same seniority unit, this court was certainly not presented with evidence to that effect.

Also criticized by plaintiffs are certain other departments at Bessemer - such as the Inspection, Boilerhouse, Railroad, and Janitors[18] departments - seeing the existence of such departments as frustrating opportunities for black employees. These same departments, however, are likewise to be found at either the Hammond or Butler plants, or both. Indeed, putting aside those departments whose existence was incident to the recognition of three separate unions,[19] the configuration of departments at Bessemer is quite similar to that at Pullman's Butler plant. There are, in fact, two instances where broader seniority

is provided at Bessemer than at Butler - Butler's Punch and Shear departments being combined at Bessemer into a single department, as is also true with respect to the Paint and Shipping Track departments.

Individual differences in the departmental structures at Pullman's Bessemer and Butler plants, such as they are, do not establish that either is irrational or inconsistent with industry practices. While it is appropriate to view, as this court has done, the systems under a microscope, the ultimate objective should be to comprehend the gestalt of the system. Here, from either perspective, the court finds the departmentalization at Pullman to be rational, in accord with the industry practice, and consistent with NLRB policies. As stated by the Supreme Court in Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39, 31 LRRM 2548 (1953),

"A wide range of reasonableness must be allowed a statutory bargaining representative * * * subject always to complete good faith and honesty of purpose in the exercise of its discretion. * * * Variations acceptable in the discretion of bargaining representatives * * * may well include differences based upon such matters as the unit within which seniority is to be computed."

(3) Genesis of Seniority System.

Next the court must consider "whether the seniority system had its genesis in racial discrimination." James, *supra*, 539 F.2d at 352, 15 FEP Cases at 861. Taken from a factual finding in Teamsters, this factor, while ambiguous, is presumably not wholly dependent[20] upon a determination that racial discrimination had a causative relationship with the seniority system. It rather implies that consideration should be given to the extent of racially discriminatory practices at the time the seniority system came into existence.

In the case *sub judice,* two times of "origin" might be examined - in 1941 - 42, when union organizational efforts were finally successful and the first collective bargaining agreements were signed; or in 1954, when the seniority system under attack in this litigation became essentially fixed. Selection of the more appropriate date is not, however, critical under the circumstances of this case, for the evidence reflects similar practices at both periods.

Both in 1941 and in 1954, racial segregation was extensively practiced at the company's Bessemer plant, in the local union hall, and in the community as a whole. Most of the jobs at the plant were by custom treated as "white only" or "black only" - or, more accurately, as "white" or "colored". Bathhouses, locker rooms, and toilet facilities were racially segregated. Company records - including employee rosters, internal correspondence, records of negotiation sessions, lists of persons picketing - included racial designations. In 1941 some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated. The court can take judicial notice of the widespread extent of segregation in the community - in schools, transportation, public accommodations, et cetera.

Considering the apparent pervasiveness of such discrimination, one may naturally infer that related matters - such as a seniority system - must, even when facially neutral, have been the product of the same discriminatory animus. And yet, based on the very extent of such other forms of discrimination, it may well be that racial considerations were not involved - being "unnecessary" - in the development of a particular practice. Great care should be given in drawing the correct inference from such evidence, as has been illustrated in voter dilution cases where similar circumstantial evidence has been presented. See Taylor

v. McKeithen, 499 F.2d 893, 896 (CA5 1974); McGill v. Gadsden County Commission, 535 F.2d 277, 280-81 (CA5 1976); Nevett v. Sides, — F.2d —, slip op. 3373 (CA5 1978).

[UNIONIZATION]

One of the few mutual and common ventures of blacks and whites at Pullman's Bessemer plant in 1941 - one which , due to laws of the United States and their enforcement by the NLRB, treated the two races as the same - was the unionization effort by the predecessor of the USW. The success of its drive for representation and recognition must be attributed in large part to the black workers, who constituted more than half of the election unit. In 1954, as was true in 1941 and in the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formulation of the policies and positions of the union - the local not being dominated by whites. While possessing some of the trappings taken from an otherwise segregated society,[21] the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations.

Although determined by collective bargaining, a seniority system may properly be viewed as the manifestation of a union objective, one which operates in opposition to and as a limitation upon the managerial powers sought by the company. This generalization is shown by the evidence to be applicable to the case *sub judice*, where, although certainly affected by the process of negotiation, the seniority system under attack is essentially the product of USW aims and policies. The use of departmental age for seniority purposes was adopted in the first 1941-42 contract at the request of the USW's predecessor. The return to departmental age in 1954, as a consequence of the first company-wide collective bargaining agreement, was in fact a

broadening of the seniority by "occupation-within-a-department" which had been adopted in 1947 at the urging of the USW local - indeed, at the request of a black member of that USW negotiating committee. Since 1954 the union has continued its support for departmental seniority and has rejected certain company efforts to merge departments for broader seniority.

The seniority system under attack had its genesis - whether viewed as being in 1941-42 or in 1954 - at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of colorblind objectives of a union which - unlike most structures and institutions of the era - was not an arm of a segregated society. Nor did it foster the discrimination - of treating certain jobs as being for one race or the other - which was being practiced by custom in the plant. Indeed, it was this very seniority system which, as a result of arbitration in 1965, provided the means for stopping that discrimination even before the effective date of Title VII.

In reviewing the history of collective bargaining at Pullman's Bessemer plant, an inquiry which has relevance to and could be treated under each of the four James factors, the plaintiffs note the role played by the IBEW. During its short-lived tenure, the IBEW was an all-white unit - a matter, however, for which neither the company nor the USW can be blamed. In any event, it was decertified in 1946, with its members being reabsorbed into the Maintenance department represented by the USW. The next USW contract, at the suggestion of a black member of the negotiating committee, provided such persons (no differently from other USW members) with occupational seniority. While the plaintiffs challenge the spin-off of one part of the former IBEW members into a separate department (Powerhouse) in 1954 when departmental seniority was reinstituted, it should be noted that this provided them with no greater seniority protec-

tion than they had enjoyed during the 1941-46 period when they were part of an all-white representational unit.

[ROLE OF IAM]

Even greater stress is placed by the plaintiffs on the role of the IAM. Plaintiffs view the evidence as showing that the IAM never wanted to represent any black employees and that, by a series of maneuvers including agreements with the NLRB and later a partial ceding of members, it was able to eliminate blacks from its membership, a matter which continued until passage of Title VII. While the objective facts are not greatly in dispute, the defendants here do challenge the characterization of the IAM motives, asserting that the changes took place because of initial confusion over which craft and craft-related positions should be properly represented by the IAM and because of subsequent loss of support of the IAM by many of its members.

Whatever the motives of the IAM in the 1941-42 period - the court finds it unnecessary to resolve this factual dispute - the USW cannot be charged with racial bias in its response to the IAM situation. The predecessor of the USW sought to represent all workers, black and white, in the plant. It accepted additional workers of both races into its local after the election, when that opportunity presented itself. Its concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because it viewed them as scabs who had not honored picket lines. Its representation of those who had been a part of the original USW group. The departments of the former IAM members were, with one exception (the Air Brake Pipe Shop), the same as had existed prior to any unionization or seniority rights. While the Air Brake Pipe Shop was treated after the 1954 contract as a separate department, this provided no greater seniority protection than such persons

had enjoyed during the 1941-44 period (when they were members of a predominately white representational unit) or during the 1944-54 period (when they were either a separate department under departmental seniority or were under an occupational seniority system).

The effort of the plaintiffs to fix responsibility on the company for whatever racial discrimination may have existed in the IAM is likewise without merit. The company properly took a "hands-off" approach towards the establishment of the election units and the subsequent modifications of the representational units. It bargained with those unions which were afforded representational status by the NLRB. and did so without any discriminatory animus.

The seniority system under challenge in the case *sub judice* - that between the company and the USW - had its genesis *at a time* when there was wide-spread racial segregation but *not as a result of, nor in furterance of,* such discrimination.

(4) Purposes of Seniority System.

The fourth factor is "whether the system was negotiated and has been maintained free from any illegal purpose." James, *supra,* 559 F.2d at 352. 15 FEP Cases at 861. On the basis of facts already discussed in this opinion, which need not be here repeated, the court finds that the seniority system between the company and the USW has been negotiated and maintained free from any discriminatory purpose. In reaching this conclusion, the court has carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years. This is not a situation, such as was described in James, *supra,* where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices. The major impediment to employment opportunities for blacks - the custom of treating certain jobs as reserved for members of a particular race - was removed prior to

the effective date of Title VII by the very instrument here under attack, i.e., the seniority system. That system did not then provide - nor has there been any subsequent effort to erect - barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. The provision for seniority by departmental age - which, depending upon viewpoint, may be viewed either as a restriction or as a protection - has been negotiated and maintained by blacks, no less than by whites.

(5) Totality.

[2] The factors extracted by James from Teamsters are ultimately but aids, or focal points, for deciding "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system", which is in turn "integral to a determination that the system is or is not bona fide." James *supra,* 559 F.2d at 351. 15 FEP Cases at 861. Looking not only to the four factors at least three[22] of which are found here adverse to the plaintiffs, but also to totality of the system under attack, the court finds and concludes that the system is "bona fide" and that the differences in terms, conditions or privileges of employment resulting thereunder are "not the result of an intention to discriminate" because of race or color. The defendants have met the burden of proving the applicability of Section 703(h) of the Civil Rights Act of 1964. Judgment will be entered accordingly.

III. Attorneys Fees and Costs.

[3] While the defendants have prevailed in this litigation, neither in its institution nor in continuation were the plaintiffs' claims frivolous, unreasonable or groundless. Award of attorney's fees is denied under the authority of Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 46 LW 4105, 16 FEP Cases 502(1978). Costs not previously taxed shall moreover be borne by the respective parties incurring the same.

Judgment

In accordance with the findings of fact and conclusions of law contained in the Memorandum of Opinion filed concurrently herewith, judgment is hereby entered in favor of the defendants. Each party shall bear its own costs.

Appendix E - Footnotes

[1] In March 1978 the plaintiffs moved the court to take judicial notice under FRE 201 of parts of answers to interrogatories filed by the International Association of Machinists in a case in this court involving another company. While judicial notice can be taken under FRE 201(f) after the evidence has been closed, this request is due to be denied as involving matters not covered by FRE 201(b). In short, the matters sought to be noticed are neither "(1) generally known within the territorial jurisdiction of the trial court" nor (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Indeed, while IAM's answers to interrogatories in another case (or even in this case) could have been introduced in evidence *against* IAM as a party-opponent (albeit a party for the very limited purpose of possible relief) under FRE 801(d)(2), such hearsay would not have been admitted against other defendants under FRE 802. Unlike depositions — which have a special rule of admissibility provided in the Federal Rules of Civil Procedure — interrogatories must, when offered in evidence to prove the truth of the matters asserted therein, satisfy some exemption or exception to the hearsay rules of the FRE. See 4A Moore's Federal Practice ¶33.29 [1. — 2]. Even in circumstances where they would have been admissible if offered, the unoffered interrogatories are not treated as evidence or the subject of judicial notice. See Jones v. Diamond, 519 F.2d 1090, 1098 n.13 (CA5 1975); Bracey v. Grenoble, 494 F.2d 566, 570 n.7 (CA3 1974).

[2] The IAM and its Local Lodge 372 were not named in the EEOC charges from which this litigation arose or in the complaints initially filed in this court. They were joined as defendants at the time of trial for the limited purpose that the relief to which the plaintiffs might be entitled against the company and the USW might involve possible modification of the IAM collective bargaining agreements. The limited role of the IAM defendants does not mean, however, as the company apparently contends, that evidence respecting the IAM and its agreements is irrelevant to the issues concerning the validity of the seniority system existing between the company and the USW — such matters being part of the "totality of the circumstances in the development and maintenance" of the system which is at issue. See James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352, 15 FEP Cases 827, 861 (CA5 1977).

[3] It is not without significance to the issue now before the court that it was the seniority system itself which in early 1965 provided the means for overturning the practice of job segregation.

[4] There is no claim that the effects of prior discrimination in segregation of jobs within a department are perpetuated by the USW seniority system, for the system allows use of departmental age for promotions without the interposition of lines of progression. The IAM agreement, measuring seniority by job classification within the department, makes no provision for use of seniority in promotions.

[5] One of the USW departments, the Boiler House, which at its peak had but, three employees, was vacated on June 22, 1964.

[6] See Pullman-Standard II, 539 F.2d at 82 n.3, 13 FEP Cases at 607.

[7] At one of Pullman's four plants (Worcester), a system of plant-wide seniority was adopted. According to the evidence, the problems created by the rule contributed substantially to the ultimate closing of the plant for economic reasons.

[8] Actually, at the time the Inspection department was created, seniority was measured by service in the occupation within the department, so that its creation as a separate department, so that its creation as a separate department deprived no one, white or black, of employment opportunities. With the return several years later to departmental seniority, it did, in retrospect, mean a loss of opportunities to both whites and blacks in the operating departments.

[9] Plaintiffs specifically disavow any intent to condemn all departmental seniority systems. The approach, however, of their attack on the system here in issue includes elements which would apply to all such systems.

[10] The Hammond plant does not build cars. It only provides repair services and produces certain parts and components.

[11] It would be equally appropriate to treat these matters under the factors involving the purposes of the seniority system, for the plaintiffs' attack partakes of both facets.

[12] There is a dispute between the parties as to whether the shops were treated as separate departments prior to unionization. The court finds that, although certain employees in the Wheel & Axle shop were joined with those in the Truck shop for cost accounting purposes, the two were in fact treated as separate departments.

[13] The original NLRB certification and election had included employees of both departments in the same representational unit. However, a clarification was issued the following month by the NLRB to the effect that most of the Wheel & Axle employees were in the IAM unit, with the Truck employees being in the USW unit.

[14] It is not without significance that blacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeemen, and negotiators. While not foreclosing the possibility of discriminatory conduct, see Rodriquez v. East Texas Motor Freight, 505 F.2d 40, 8 FEP Cases 1246 (CA5 1974), these facts are certainly relevant to the issues before the court.

[15] The Steelworkers Organizing Committee later became part of the USW. For simplicity SWOC is treated in this Memorandum as equivalent to the USW.

[16] In 1946 the IBEW was decertified and the employees in the two IBEW units became USW members. Thereafter they were included in USW contracts.

[17] As will be noted infra, a substantial portion of IAM workers were ceded in 1944 to the USW, leaving two IAM units which were, until much later, all-white.

[18] It may be noted that the possibility of merging the Janitors and Plant Protection employees was raised in 1962 by a white member of the union negotiating committee, but rejected by a black member of that negotiating committee who was a member of the Janitors department.

[19] Bessemer's Air Brake Pipe Shop is another which was created as a result of the tri-partite certification and election. It has retained separate existence as a department except during the period when the USW contract called for occupational seniority.

[20] The "genesis" factor, if dependent upon a finding of causation, might well be surplusage in view of the fourth factor ("whether the system was negotiated * * * free from any illegal purpose") unless, that is, the fourth factor were treated as involving only the later period of time when the challenged collective bargaining agreement was negotiated. While "causation" is here held not to be a condition precedent to relevancy under the third factor, it is nevertheless of great

significance in determining its weight. After all, it is the applicability of Section 703(h) that is ultimately before the court. See Southbridge Plastics v. Local 759. Rubber Workers, 565 F.2d 913, 16 FEP Cases 507 (CA5 1978).

[21] E.g., separate seating and separate social functions for whites and blacks.

[22] The "genesis" factor may be said to be favorable to the plaintiffs if causation be ignored and the existence of other discrimination be deemed sufficient.

APPENDIX F

Louis SWINT and Willie James Johnson, on behalf of themselves and others similarly situated, Plaintiffs-Appellants,

v.

PULLMAN-STANDARD, Bessemer, Alabama, United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO and International Association of Machinists and Aerospace Workers, AFL-CIO, Defendants-Appellees.

No. 78-2449.

United States Court of Appeals,
Fifth Circuit.

Aug. 18, 1980.

After remand in employment discrimination action brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C.A. section 1981, 539 F.2d 77, appeal was taken from an order of the United States District Court for the Northern District of Alabama, Samuel C. Pointer, Jr., J., which, inter alia, upheld the validity of employer's seniority system and selection of supervisors. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) although statistics disclosed that employer made significant advancements in elimination of previous all black and all-white departments subsequent to 1966, total employment picture established that employer made racially discriminatory assignments after effective date of Title VII; (2) employer's departmental seniority system was not "bona fide" within meaning of applicable section of Title VII; and (3) employer failed to rebut plaintiff's prima facie case of racial discrimination in selection of supervisory personnel.

Reversed and remanded.

1. Civil Rights key 44(1)

In racial discrimination cases, statistics often demonstrate more than testimony of many witnesses and they should be given proper effect by the courts. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights key 44(1)

Although statistics disclosed that employer made significant advancements in elimination of previous all-black and all-white departments subsequent to 1966, total employment picture established that employer made racially discriminatory assignments after effective date of Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e at seq.

3. Civil Rights key 9.12

Employer's departmental seniority system was not "bona fide" within meaning of applicable section of Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e-2(h).

4. Federal Courts key 858

Findings of fact by district court in Title VII cases are not to be set aside unless they are clearly erroneous, i. e., unless appellate court is left with definite and firm conviction that a mistake has been committed; however, where findings are made under an erroneous view of controlling legal principles, clearly erroneous rule does not apply and findings may not stand. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights key 9.10

Doctrine of business necessity is operative when an employment criteria which is fair in form but discriminatory in operation is otherwise shown by defendant to be related to job performance; however, a bona fide occupational qualification is deliberately calculated by employer to discriminate.

6. Civil Rights key 39

An employment criteria is justified under bona fide occupational qualification defense to a charge of employment discrimination when a certain sex, national origin, or religion is reasonably necessary to satisfy particular business need. Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C.A. § 2000e-2(e)(1).

7. Civil Rights key 9.10

Bona fide occupational qualification exception was not applicable where alleged discrimination in selection of supervisory personnel was based on race. Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C.A. § 2000e-2(e)(1).

8. Civil Rights key 39

Only justification for standards or procedures which operate to deny blacks promotional opportunities is business necessity defense.

9. Civil Rights key 9.10

Factors for determining whether promotional standards and procedures arise from a legitimate business necessity so as not to constitute a Title VII violation are: (1) whether standards and procedures are shown to be significantly related to successful job performance; (2) whether procedures operated to disqualify a substantially higher rate of blacks than whites; and (3)

whether jobs in question have formally been filled by whites as part of a longstanding practice of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Civil Rights key **43**

Employers failed to rebut plaintiff's prima facie of racial discrimination in selection of supervisory personnel. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Oscar W. Adams, Jr., Birmingham, Ala., Elaine R. Jones, Washington, D. C., for plaintiffs-appellants.

Thomas, Taliaferro, Forman, Burr & Murray, Birmingham, Ala., Bernard Kleiman, Chicago, Ill., Carl B. Frankel, Pittsburgh, Pa., Franklin B. Snyder, Chicago, Ill., for Pullman-Standard.

Cooper, Mitch & Crawford, John C. Falkenberry, C. V. Stelzenmuller, D. Frank Davis, Birmingham, Ala., for United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO & Intern. Ass'n of Machinists & Aerospace Workers, AFL-CIO.

Appeal from the District Court for the Northern District of Alabama.

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

In this class action employment discrimination suit, before us for the second time, we review judgments of the district court rejecting claims of racial discrimination in employment. The claims are primarily aimed at the establishment and continuation of a departmental seniority system and the selection of

supervisory personnel. Because we find certain conclusions of the district court to be inconsistent with the applicable case law and unsupported by the record, we reverse the judgments and remand for proceedings necessary to render appropriate relief.

The original complaint in this action was filed on October 19, 1971, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. The claims of racial discrimination were made against Pullman-Standard, a division of Pullman, Inc., a manufacturer of railway freight cars and parts, United Steelworkers of America (U.S.W.) and its Local 1466, the bargaining representative of most of the production and maintenance workers at Pullman-Standard. Leave of court was granted to amend the complaint to add as a defendant, for purposes of relief other than money damages, the International Association of Machinists (I.A.M.), the bargaining representative of other departmental units at Pullman-Standard. The class was certified pursuant to Fed.R.Civ.P. 23(b)(2) on behalf of all black persons who worked at any time "within one year prior to the filing of any charges under Title VII."

In July and August of 1974, a sixteen-day trial was held in the United States District Court for the Northern District of Alabama. Appellants challenged discrimination in the departmental seniority system negotiated by the appellees, its procedure for assignment of work within the same job classification, promotions to supervisory positions, lack of job posting, and the discharge of plaintiffs' and plaintiff-intervenor Clyde Humphrey. At the close of appellants case, the U.S.W. and Local 1466 filed motions for involuntary dismissal of the claims asserted by plaintiff-intervenor Clyde Humphrey that the union failed to represent them because of their race. The motion was granted and those claims were dismissed. On September 13, 1974, the district court denied the appellants' several claims of racial discrimination. On appeal to this court, we affirmed the

judgment in part and remanded in part for further proceedings with respect to the issues of the seniority system and the selection of supervisors. *Swint* v. *Pullman-Standard,* 539 F.2d 77 (5th Cir. 1976).

FACTS

We need not restate the extensive factual background contained in our decision on the first appeal, *Swint* v. *Pullman-Standard.* The following facts are helpful, however, in discussing the issues relevant to this second appeal.

Since the first collective bargaining agreements were negotiated between Pullman-Standard and the U.S.W. and I.A.M. in 1941, seniority was measured by length of continuous service in a particular department. Seniority has been exercised in the event of increases and decreases of forces, in competition with all other employees in that department. Under the company-wide collective bargaining agreement negotiated in 1954, there were no lines of promotion or progession in any department. Seniority was not formally recognized for promotional purposes until 1956. There was no carryover of seniority. Employees transferring from one department to another were treated as "new" employees in the department to which transferred, and, with limited exception for those transferring at the request of the company or electing transfer in lieu of lay-off, also lost their seniority in the "old" department. Seniority rosters at the company were maintained by department. Departmental age was basically the sole criterion used to determine who was rolled-back or laid-off in the event of reductions, and who was recalled or promoted in the event of force increases or other vacancies in the department. The seniority system in effect in 1954 remained virtually unchanged through the next eighteen years of collective bargaining between Pullman-Standard, and the U.S.W. and I.A.M.

In 1972, provisions were made in an agreement with the Office of Federal Contract Compliance (O.F.C.C.), to permit black employees hired before April 30, 1965, to transfer from predominately black departments or to predominately white departments, in either case, with carryover of seniority. The restriction against carryover of seniority on departmental transfers continued in effect as to black employees when transferring from a "mixed" department to another "mixed" department, as well as to black employees hired after April 30, 1965, and to white employees.

Until the arbitration decision in March of 1965, there was an informal custom at the plant of treating certain jobs as "white only" and others as "black only." This practice caused decisions respecting assignments to departments throughout the plant to be infected during that period with racial considerations. According to the plaintiffs, the effects of this discrimination in the departmental assignments have been perpetuated by the seniority system—a system which determines employment rights on the basis of departmental age, and which, even with the 1972 changes, provides barriers to departmental transfers.

Prior to June 1965 there were no black foremen at Pullman-Standard. At the time of the first trial, approximately ten percent of the salaried foremen were black. The labor market, at the time of this trial, ranged from twenty-five to thirty-five percent black, depending on the age group and area selected. Pullman's work force, depending upon the time selected, ranges from approximately forty-five to almost fifty percent black. Selection of foremen is made by groups of supervisors, without any objective standards or tests. The plant manager and superintendent choose department heads (C foremen) who in turn select tract supervisors (B foremen), production foremen (A or salaried foremen), and hourly (temporary) foremen. The first black salaried foreman was not promoted to the then 143 existing salaried foreman positions until 1966. Four years later,

there were nine black salaried foremen and 151 white foremen. Up until the time of trial, blacks had never been offered either salaried or temporary foreman positions in thirteen of the twenty-eight departments at Pullman-Standard. From 1966 until the time of trial, only twelve blacks were selected to fill fifty-nine salaried foreman vacancies.

THE DISTRICT COURT'S ORDER

On July 5, 1977, the district court, pursuant to our remand for further proceedings with respect to issues regarding the validity of the seniority system and the selection of supervisors, concluded that the seniority system at Pullman-Standard does not discriminate against blacks, is "valid" under 42 U.S.C. § 2000e-2(h), and the appellees did not follow any practice or policy after the effective date of the Act which discriminated against blacks in the assignmet of employees to departments; further, the appellants' prima facie showing of discrimination in the selection of supervisory personnel has been rebutted by the appellees, and no such discriminatory practice existed subsequent to 1966. At the request of appellants, the district court granted a new trial for the limited purpose of receiving new evidence which would have been relevant under the Supreme Court's decision in *Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The present case was under submission when *Teamsters* was decided and had been tried at a time when all concerned acted under what turned out to be an erroneous view of the law. On May 8, 1978, after hearing further evidence, the district court entered an order finding the seniority system in question to be "bona fide" within the meaning of section 703(h) of Title VII.

ISSUES

The critical issues before us are: (1) whether Pullman-Standard made racially discriminatory assignments to departments after the effective date of Title VII of the Civil Rights Act of 1964, (2) whether the seniority system at Pullman-Standard is "bona fide" within the meaning of § 703(h) of Title VII, and (3) whether Pullman-Standard successfully rebutted appellants' prima facie case of racial discrimination in the selection of foremen.

I

The appellants argue that the district court erred in its finding that Pullman-Standard's post-Act assignments to departments were not racially motivated. In *Teamsters* v. *United States,* the Supreme Court held that a finding of validity respecting a seniority system does not thereby preclude the implementation of remedial measures for persons who seek relief from an employer's *post-Act* hiring discrimination. *See Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). Based upon *Teamsters,* and *Franks,* the district court proceeded to make an initial determination whether the seniority system was "valid" under 42 U.S.C. § 2000e-2(h). After finding that the seniority system does not discriminate against blacks and is therefore "valid," the court considered whether there were discriminatory assignments to departments on and after December 27, 1966,[1] and found that there were not.

To facilitate its evaluation of the issue of post-Act departmental assignments, the district court utilized statistics obtained from the compnay's records, which consisted of seniority lists for the years 1965 to 1973.

---

[1]All footnotes for this section appear at the end of this Appendix, pp. A-178-A-179.

The district court made a chart showing, for back years starting June 1966, the number of individuals by race, assigned to each of the twenty-eight departments at Pullman-Standard. The court found it useful to look particularly at assignments after December 1966, in the six formerly one-race departments. Although the district court did not reproduce the chart in its Memorandum Opinion, the court interpreted from the chart that Pullman-Standard, after December 1966, was no longer making assignments to departments based on race, except to the extent of attempting to rectify imbalances caused by its earlier discriminatory practices.

[1] "In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts. *Jones* v. *Lee Way Motor Freight, Inc.*, [431 F.2d 245 (10th Cir. 1970)];" *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[2] Our review of the exhibits upon which the district court based its conclusion reveals erroneous interpretations of the statistics contained therein. In 1966, the Die & Tool Department (I.A.M.) included seventy-seven whites and no blacks. The district court found that six blacks and one white were assigned to the Die & Tool Department (I.A.M.), in 1966, and over the next four years, seven other blacks and eight whites were assigned to it. Our review of the evidence indicates that between 1965 and 1970, the company made approximately thirty-six new assignments to this department, all white persons. The first black was assigned to the department in 1970. In 1971, seven whites were assigned to the department along with two more blacks.

In 1966, there were seventy whites in the Maintenance Department (I.A.M.), and no blacks. The district court found that the first post-1966 assignments to the Maintenance Department (I.A.M.), were three blacks and four whites. The record evidence establishes that the company assigned seven new employees to this department between 1967 and 1970, all of whom were white. The first blacks were assigned to the department in 1970 when six blacks were assigned to the department along with four whites.

The district court found that, subsequent to 1966, the first vacancies in the other previous all-white departments are filled by blacks and the first vacancies in the previous all-black departments are filled by whites. At this point, the court essentially ended its analysis and concluded that there was no policy or practice of discriminatory departmental assignments after December 1966. Our examination of the statistics is in the context of the plant as a whole. Although the statistics disclose that the company made significant advancements in the elimination of previous all-black and all-white departments subsequent to 1966,[2] the total employment picture indicates that departmental assignments continued to be infected with racial considerations, albeit to a lesser degree than during the pre-Act period.

We find the district court's conclusion that no discrimination existed in post-Act assignments to be factually unsubstantiated. We have carefully reviewed the post-Act assignment statistics and, taken as a whole, they clearly support the appellants' contention that Pullman-Standard discriminated against blacks in the assignment of employees to departments after the applicable period.

II

[3] The appellants argue that the district court erred in concluding that the departmental seniority system is "bona fide" within the purview of Section 703(h) of the Civil Rights Act of 1964.

In *Teamsters* v. *United States,* the Supreme Court held that, absent a showing of discriminatory purpose in a seniority system, that system is protected by § 703(h), 42 U.S.C. § 2000e-2(h) from attack on Title VII on grounds. *Harris* v. *Plastics Mfg. Co.,* 617 F.2d 438 (5th Cir. 1980). *Fisher* v. *Proctor & Gamble Manufacturing Co.,* 613 F.2d 527 (5th Cir. 1980). *Pettway* v. *American Cast Iron Pipe Co.,* 576 F.2d 1157 (5th Cir. 1978). *Southbridge Plastics Division, etc.* v. *Local Valves & Fittings Co.,* 565 F.2d 913 (5th Cir. 1978). *James* v. *Stockham Valves & Fittings Co.,* 559 F.2d 310 (1977), *cert. denied,* 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). Section 703(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

In *James* v. *Stockham Valves & Fittings Co.,* we noted that the analysis in *Teamsters* suggests that the totality of the circumstances in the development and maintenance of a seniority system is relevant to examining "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system [which is] integral to a determination that the system is or is not bona fide." *James,* at 351. *James* extracts four factors from *Teamsters* which are helpful in deciding this issue:

1. Whether the seniority system operates to discourage all employees equally from transferring between seniority units;

2. Whether the seniority units are in the same or separate bargaining units (if the latter, whether that

structure is rational and in conformance with industry practice);

3. Whether the seniority system has its genesis in racial discrimination; and

4. Whether the system was negotiated and has been maintained free from any illegal purpose.

James, at 352.

Although the district court appropriately utilized the analysis provided in *James,* we are not satisfied that the court's ultimate conclusion is amply supported by the record evidence.

In consideration of "[w]hether the seniority system operates to discourage all employees equally from transferring between seniority units," *James,* at 352, the district court made several findings. It found that the departmental seniority system was applied in a uniform manner, regardless of race or color, and that the limited number of interdepartmental transfers granted were handled in a fair and nondiscriminatory manner. The district court found that, to the extent the seniority system "locks" employees into a department and discourages transfers, it does so equally for both whites and blacks—that is, it did so until 1972. The district court acknowledged that a somewhat greater impact might be felt by blacks than by whites if one were to rank the 28 U.S.W. and I.A.M. departments according to some perceived order of desirability to determine which group was the more discouraged from transferring. According to the district court, such a study of relative economic desirability would be inappropriate in light of the rationale in our decision on the previous appeal, 539 F.2d 77 (1976). As the district court stated in its order, "if one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite—equality or neutrality without reference of such desirability." Our holding that appellants need not show that they were assigned discriminatorily to less

desirable departments in order to prove a prima facie case of racial discrimination cannot reasonably be construed to preclude consideration of the fact that by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites.

While acknowledging differences in the departmental structure at Pullman-Standard from those at other Pullman plants, the district court did not find such differences sufficient to establish the departmental structure to be irrational or inconsistent with industry practices. The court concluded that the seniority units at Pullman-Standard constitute a rational structure, "in context, and taken as a whole." They are, according to the district court, consistent with practices which were, at the time, generally followed at other unionized plants throughout the country, at other companies in the same industry, and at Pullman plants located outside of the south where race was presumably not a potential consideration. In attacking the rationality of the seniority units, appellants primarily attacked the two separate Die & Tool Departments and the two separate Maintenance Departments at Pullman-Standard. No similar situations existed at Pullman's other plants.[3] No such division existed at Pullman-Standard prior to unionization and seniority. The district court placed primary responsibility for this situation on the N.L.R.B. In 1941, at the request of the petitioning unions, the N.L.R.B. divided the plant into three representational units for election purposes. This was allegedly done over the opposition of the predecessors of the U.S.W.,[4] which sought to represent all production and maintenance employees. The district court did not find this circumstance to diminish the bona fides of the seniority system between the company and the U.S.W. The court asserted that the separation within the various units was not, as in *Teamsters,* "consistent with National Relations Board precedent," *Teamsters,* 431 U.S. at 356, 97 S.Ct. at 1865; but was required by a specific decision of the N.L.R.B. and the outcome of the elections. Accordingly, the court found the departmentalization at Pullman-Standard to be

rational, in accord with industry practice, and consistent with N.L.R.B. policies.

The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races.

As of the date of its certification to represent employees of Pullman-Standard, November 19, 1941, the I.A.M. unit included twenty-four black workers. Shortly thereafter, agreements between the I.A.M. and Steel Workers Organizing Committee (S.W.O.C.)[1] resulted in the I.A.M. giving its black members to the S.W.O.C. in return for two of the S.W.O.C.'s white members, which resulted in the I.A.M. being an all-white bargaining unit. The first U.S.W. contract with Pullman-Standard, providing for departmental seniority, excluded blacks from the better jobs. Blacks were relegated to the least remunerative departments. The creation of the new departments in the years subsequent to unionization involved continued separation of the races. The general effect of the new department was to restrict black workers to lower paying jobs. For example, the seniority rosters indicate that between 1947 and 1952, the all-white watchmen and all-black janitors were both in the Safety Department. The 1953 seniority list carries both jobs under a Plant Protection Department. The 1954 seniority list shows the janitors in an all-black Janitors Department and the watchmen in an all-white Plant Protection Department. They remained separate departments until the time of trial.

The evidence further indicates that the Pullman-Standard plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers.

The record evidence, generally, indicates arbitrary creation of the departments by the company since unionization and an attendant adverse affect on black workers. The individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice, are indicative of attempts to maintain one-race departments.

The district court determined that the seniority system in the present case has its genesis at a time when there was widespread racial segregation, but the system was not itself the product of this bias. The court took judicial notice of the widespread extent of segregation in the community in 1941-42, when organizational efforts were successful and the first collective bargaining agreements were signed, and also in 1954, when the seniority system in this litigation became essentailly fixed. At both times, racial segregation was extensively practiced at Pullman-Standard, in the union hall, and in the community as a whole. Most of the jobs at the plant were, by custom, treated as "white only" or "black only." Bath houses, locker rooms, and toilet facilities were racially segregated. So were company records, including employee rosters, internal correspondence, records of negotiation sessions, and lists of persons picketing. The court acknowledged that in 1941, some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions at the unions were also segregated.

The court found that, although the U.S.W. Local possessed some of the local trappings taken from an otherwise segregated society, it did not function in fact to foster and maintain segregation. Rather, it served a joint interest of white and black workers for a higher priority than racial considerations. Further, in 1954, as well as 1941 and the intervening years, blacks

were involved actively in the leadership of the local union and had an equal vote in the formulation of the policies and positions of the union, the local not being dominated by whites.

The court took into consideration the plaintiffs' contention that the I.A.M. effectively eliminated blacks from its membership. The court dismissed the relevancy of this point by concluding that the U.S.W. cannot be charged with racial bias in response to the I.A.M. situation and that the U.S.W. sought to represent all workers, black and white, in the plant.

The district court's failure to recognize the I.A.M. as a party to the present case blemishes its consideration of the genesis of the seniority system. Although the I.A.M. is a party to the present case for purposes of relief other than money damages, it is indeed a party. The motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination. The I.A.M. was one of the unions which unionized the company in 1941 and the evidence reflects that the I.A.M. manifested an intent to selectively exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding. The record makes clear that blacks were restricted from the better jobs under the first U.S.W. contract. The district court itself indicated that the first instance disclosed by the record in which the U.S.W. sought to remove the restriction of "black only" jobs was in 1965. It is crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter.

The district court found that the seniority system had been negotiated and maintained free from any discriminatory purpose. According to the court, this is not a situation, as was described in *James* v. *Stockham Valves & Fittings Co.*, where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices. The court asserted that the major impediment to employment op-

portunities for blacks—the custom of treating certain jobs as reserved for members of a particular race—was removed prior to the effective date of Title VII by the very instrument under attack, i.e., the seniority system. Finally, the court found that the provision for seniority by departmental age has been negotiated and maintained by blacks as well as whites.

The court concluded that it found at least three of the four factors provided for analysis in *James*, in addition to general considerations of the totality of the system under attack, to be adverse to the plaintiffs. Therefore, the system was determined to be "bona fide."

Having carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is "bona fide" within the meaning of section 703(h) of Title VII, we reject the district court's finding.

[4] An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made.[6] There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.

The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U.S.W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U.S.C. §2000e-2(h).

III

The district court concluded that plaintiffs had made a prima facie case of racial discrimination in the selection of supervisory personnel but that the defendants rebutted it.

The district court accepted Pullman-Standard's insistence that "special skills" are needed to be supervisors. The court acknowledged the practice at Pullman of selecting salaried supervisors from the ranks of those who have purportedly demonstrated their capabilities as temporary foremen. This limitation was found by the court to be a bona fide occupational qualification, sufficient to rebut plaintiffs' prima facie showing with respect to salaried supervisors.

The court considered it appropriate in this case to analyze promotions to temporary foreman on a departmental basis. Promotions to temporary foreman are made according to the needs of the individual departments, they are made by the supervisory personnel in that department, and are made from the employees working in that department. The district court found this restriction of such temporary promotions to persons

working in the particular department to be a "bona fide occupational qualification, justified by business necessity, under the evidence in this case."

The fact that blacks were concentrated in certain departments, and were not significantly represented in departments from which supervisors were selected as needed, was taken into consideration by the district court. The court focused on the large disparity in promotions in the Welding Department. During 1967 and 1968, there were twenty promotions in that department and not a single black was selected. The problem, according to the district court, was that black welders had only a few months of experience as welders at that time, and did not possess the skills needed to act as formen in that department. This was considered not to be the result of any post-Act discrimination—the company had actively sought and trained blacks to be welders. But, to prevent employment of unqualified welders, the company adopted procedures to verify qualifications.

First, the district court's finding that "the restriction of . . . temporary promotions to persons working in the department is a bona fide occupation qualification, justified by business necessity . ." confuses the definite distinction between a bona fide occupational qualification defense and a business necessity defense. Although the two concepts are similar and distinct, and apply to different factual situations.

[5,6] The doctrine of business necessity is operative when an employment criteria which is "fair in form, but discriminatory in operation" is otherwise shown by the defendant to be related to job performance. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 431, 91 S.Ct. 849 at 853, 28 L.Ed.2d 158. A bona fide occupational qualification, on the other hand, is deliberately calculated by the employer to discriminate. An employment criteria is justified under the bona fide occupational qualification defense when a certain sex, national origin, or religion is reasonably

necessary to satisfy a particular business need. *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1970). *See also, Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971).

We proceed, therefore, to consider whether the defense set forth by Pullman-Standard qualifies as either a bona fide occupational qualification or a business necessity defense.

[7] Title VII, 42 U.S.C. § 2000e-2(e)(1) permits discrimination in hiring and employment "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Neither race nor color is included in this section. We believe that the omission of race and color as bona fide occupational qualifications was deliberate and intentional on the part of Congress. Our interpretation of the legislative history of this section is that Congress did not view race as a qualification which could, conceptually, be reasonably necessary to the efficient operation of any business. Senators Clark and Case, the floor managers for the Civil Rights Bill in the Senate, submitted to the Senate and "Interpretative Memorandum" to explain the exception:

> • • • [The Section] creates certain limited exceptions from these prohibitions [of section 703]. First, it would not be an unlawful employment practice to hire or employ employees of a particular religion, sex, or national origin in those situations were religion, sex, or national origin is a bona fide occupational qualification for the job. *This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence.* This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational

> qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion * * * (110 Cong.Rec. 7213; emphasis supplied).

Diaz v. *Pan Am World Airways, Inc.*, 311 F.Supp. 559 at 569 (S.D.La.), rev'd. on other grounds, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971). The legislature, therefore, has indicated that customer preference may be considered under the limited "bona fide occupational qualification" exception in the areas of religion, sex, and national origin, but not on grounds of race or color. *See also, Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Since the alleged discrimination in this case is based on race, the bona fide occupational qualification exception cannot be applicable.

[8,9] It is settled in this circuit that "the one and only justification for standards or procedures which operate to deny Blacks promotional opportunities" is the business necessity defense. *Rowe* v. *General Motors Corp.*, 457 F.2d 348 at 354 (5th Cir. 1972). We provided in *Rowe:* "The only justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that the standards or procedures arise from a nondiscriminatory legitimate business defense. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Local 189, United Paper Makers and Paper Workers, AFL-CIO, SLC* v. *United States*, [416 F.2d 980 (5th Cir. 1969)]." *Id.* at 354. Further, we derived from *Griggs* v. *Duke Power Co.* three factors for determining whether promotional standards and procedures arise from a legitimate business necessity so as not to constitute a Title VII violation: "(1) The standards and procedures were not shown to

be significantly related to successful job performance. (2) The procedures operated to disqualify a substantially higher rate of Blacks than Whites. (3) The jobs in question had formally been filled by whites as part of a longstanding practice of discrimination. . . ." *Rowe* at 355.

[10] That factors two and three of the standard quoted above apply in favor of the appellants in this case is a foregone conclusion. In evaluation of the first factor, we are influenced by the lack of any articulated or defined skills which are necessary to perform capably as a temporary or salaried foreman at Pullman-Standard. Further, with regard to the promotion to temporary foremen of those within the particular department to which promoted, the evidence indicates that a substantial number of salaried and temporary foremen supervise departments in which they have never worked. We are additionally concerned about the low percentage of black supervisors in predominately black departments. We cannot agree that the business need advanced by the defendants for the limitation which restricts the promotion of blacks to supervisory positions is sufficiently compelling to override the significant racial impact of the limitation.

We have further held that for a practice, which is not intentionally discriminatory or neutral but perpetuates consequences of past discrimination, to be justified by business necessity, the practice must "not only foster safety and efficiency, but must be essential to that goal . . . and there must not be an acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' " *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir.), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). The district court did not expose any evidence sufficient to show that the limitation upon which the defendants' business necessity defense rests is essential to the safety and efficiency of the operations at Pullman-Standard, nor do we find evidence in the record to that end.

The district court further considered probative in its analysis of the defendants' rebuttal arguments the fact that blacks refused supervisory promotions to a greater degree than whites; and peer pressure directed by black employees against black foremen discouraged many blacks from displaying good supervisory qualities, from accepting promotions, and from remaining in supervisory postions.

These circumstances undeniably emanate from the very discrimination which the class members seek to eliminate. When insufficient initiatives which purport to rectify a personnel imbalance follow a history of preserving certain personnel positions for a select group based upon race, such peer pressure naturally and conveniently results therefrom. Furthermore, these variables relied upon by the district court do not weigh heavily enough to lessen the appellants' empirical conclusions that black employees were locked in the lower paying jobs and departments. *See Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). We hold, therefore, that the defendants failed to rebut the plaintiffs' prima facie case of racial discrimination in the selection of supervisory personnel.

IV

Pullman-Standard's claim, on appeal, that the class representatives in the present case have no standing to maintain this appeal because their individual claims have been mooted or destroyed is without merit. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). *See also, East Texas Motor Freight* v. *Rodriquez*, 431 U.S. 395, 406 n. 12, 97 S.Ct. 1891, 1898 n. 12, 52 L.Ed.2d 453 (1977); *Franks* v. *Bowman Transportation Co.*

APPROPRIATE RELIEF

Having rejected the district court's finding that Pullman-Standard did not make racially discriminatory assignments to departments after the effective date of Title VII, that the seniority system at Pullman-Standard is "bona fide" within the meaning of § 703(h) of Title VII, and that Pullman-Standard has successfully rebutted appellants' prima facie case of racial discrimination in the selection of foremen, we reverse the judgments appealed from and remand to the district court for proceedings necessary to provide appropriate relief.

REVERSED AND REMANDED.

Appendix F - Footnotes

[1] Although the first primary charge directly bringing into question the company's assignment policies was filed on May 11, 1970, a charge had been previously filed by an EEOC Commissioner on March 27, 1967 questioning the hiring and promotion practices of Pullman. Because the district court found this earlier charge to be susceptible to the interpretation that it related also to assignment and transfer matters, the court used the date 90 days before the March 27, 1967 Commission charge for its analysis.

The 1972 amendment to Title VII extended the time for filing charges to 180 days, and this extension has been considered to be effective retroactively. See, e.g., *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975). But, the district court asserts that it finds there was no practice of discriminatory assignments to departments after September 28, 1966 anymore than there was after December 27, 1966. The 180 day statutory period is inconsequential to this analysis. See generally, *Fisher* v. *Proctor & Gamble Mfg. Co.*, 613 F.2d 527 (5th Cir. 1980); *Clark* v. *Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

[2] As of the 1973 seniority list, the Boiler House Department remained the sole one-race (white) department. No assignments had been made, as of the time of trial, to that department since the effective date of Title VII.

[3] At Pullman-Standard, there are two Die and Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union.

[4] The United Steelworkers (USW) evolved from the Steelworker's Organizing Committee (SWOC).

[5] See footnote 4.

[6] Findings of fact by the district court in Title VII cases are not to be set aside unless they are clearly erroneous, *Harrison* v. *Goodyear Tire & Rubber Co.*, 508 F.2d 678 (5th Cir. 1975), Fed.R.Civ.P. 52(a), that is, unless the appellate court is "left with the definite and firm conviction that a mistake has been committed." *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980), quoting *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). Where findings, however, are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand. *See, Rowe* v. *General Motors Corp.*, 457 F.2d 348, 356 n. 15 (5th Cir. 1972); *United States* v. *Pickett's Food Service*, 360 F.2d 338, 341 (5th Cir. 1966).

In *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), we stated:

> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or non-discrimination is a finding of ultimate fact. [Cites omitted.] In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.

518 F.2d at 339.

APPENDIX G

Title VII of Civil Rights Act

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703 (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer fro employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor, organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school,

college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provison of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any

employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Sec. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Com-

mission shall accord substantial weight to final findings and order made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such prctice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first years after the effective date of such State or local law. If any requirement for the comencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of

the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the

court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employ-

ment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief jduge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems ap-

propriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (j) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CIVIL RIGHTS ACTS OF 1866

Sec. 1981 Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

JACK GREENBERG
JAMES M. NABRIT, III
JUDITH REED
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

ELAINE R. JONES
Counsel of Record
BARRY L. GOLDSTEIN
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005
(202) 682-1300

OSCAR W. ADAMS, III
2121 Eighth Avenue, North
Birmingham, Alabama 35203
Counsel for Respondents

SAMUEL H. BOOTH
C. V. STEIGERWALTER
THOMAS, TALLADEGA, FORMAN, BURR & MURRAY
1600 Bank For Savings Building
Birmingham, Alabama 35203
(205) 251-8000

F. B. SMYSER
200 South Michigan Avenue
Chicago, Illinois 60604
Counsel for Petitioner Pullman-Standard

MICHAEL H. GOTTESMAN
Counsel of Record
ROBERT M. WEINBERG
JULIA PERRY CLARK
DAVID E. SILBERMAN
BERNHOFT, GOTTESMAN, COHEN, CHARNE, WEINBERG & PERRAMALO
1666 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 328-0349

BERNARD KLEIMAN
General Counsel
UNITED STEELWORKERS OF AMERICA, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
UNITED STEELWORKERS OF AMERICA, AFL-CIO
Five Gateway Center
Pittsburgh, Pennsylvania 15222

[illegible]
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Alabama 35203

LAURENCE J. GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
Counsel For Petitioners, United Steelworkers of America, AFL-CIO And Local 1466, United Steelworkers of America, AFL-CIO

TABLE OF CONTENTS

	Page
Docket Entries	1
Amended Complaint	14
Second Amended Complaint	17
Answer of Defendant International Association of Machinists	26
Pre-Trial Order dated June 5. 1974	28
Transcript of 1974 Trial	31
Exhibits Introduced at 1974 Trial	65
Transcript of 1978 Trial	91
Exhibits Introduced at 1978 Trial	103
Depositions Introduced at 1978 Trial	337
Plaintiffs' Request for Judicial Notice of Adjudicative Facts, with attachments	346

UNITED STATES DISTRICT COURT
SOUTHERN DIVISION

CA 71-955

Jury demand date:

Denied by Oral Order 7/8/74

Re-open 9-24-76

10-11-77

BASIS: Title VII

SAM C. POINTER, JR., Judge

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,
CLYDE HUMPHREY,
Intervenor

vs.

PULLMAN-STANDARD, Bessemer, Alabama; UNITED STEELWORKERS OF AMERICA LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS

CIVIL DOCKET

DATE		PROCEEDINGS
1971		
Oct.	19	Complaint filed
	19	Summons and complaint issued—del. to U.S. Marshal for service
Nov.	5	Motion of defendants United Steelworkers of America, AFL-CIO and Local 1466, United Steelworkers of America, to dismiss the complaint filed—copy served by counsel 11/23/71 Overruled—30 days to answer (Pointer)

DATE	PROCEEDINGS
1971	
5	Summons and complaint returned executed on 10-21-71 on Pullman-Standard, on 10-28-71 on United Steelworkers of America, AFL-CIO and on 11-1-71 on United Steelworkers of America Local 1466 and filed
9	Motion of defendant Pullman-Standard to dismiss the complaint filed—copy served by counsel 11/23/71 Overruled (Pointer) cm
Dec. 23	Answer of defendants, United Steelworkers of America, AFL-CIO and Local 1466, United Steelworkers of America, to the complaint filed—copy served by counsel
30	Answer of defendant, Pullman-Standard, a Division of Pullman, Inc., a corp. to the complaint filed—copies served by counsel
1972	
Jan. 26	Interrogatories by plaintiffs propounded to defendants filed—copy served by counsel on United Steelworkers of America Local 1466 and AFL-CIO
May 30	Interrogatories of plaintiffs propounded to defendants filed—copy served by counsel on United Steelworkers of America Local 1466 and United Steel Workers of America AFL-CIO and Pullman-Standard
July 6	Order on PRETRIAL conference held July 5, 1972, dated July 6, 1972, filed and entered (Pointer) cm
10	Amendment by defendant, Pullman-Standard, to answer filed—copies served by counsel

DATE		PROCEEDINGS
1973		
Jan.	9	Objections by defendant Pullman-Standard, a Division of Pullman incorporated, a Corp. to interrogatories filed—copies served by counsel
	9	Answers of defendant Pullman-Standard to interogatories filed—exhibits attached—copies served by counsel
Jul	6	Depositions (4) of William H. Lee, Jr., Billie J. Carroll, Louis Stubbs and Harry E. DeBrow taken on behalf of plaintiffs—filed
	6	Depositions (4) of James D. Moss, Arthur S. Lightfoot, William Joseph Harris and Harry P. Crane, Jr. taken on behalf of plaintiffs—filed
1974		
Mar	11	Second interrogatories of plaintiff propounded to defendant company, filed—cs
	12	Notice that plaintiffs have associated Ms. Marilyn Holified and Jack Greenberg of 10 Columbus Circle, New York, New York 1009, as counsel of record for plaintiffs, filed—cs
May	3	Answers of defendant, Pullman-Standard, a Division of Pullman, Incorporated, by Fred W. McCool, to second interrogatories propounded by plaintiffs, filed—cs
	30	Request by pltffs for production of documents by deft, filed—cs
	31	Supplemental request by pltffs for production of documents by deft Pullman-Standard, filed—cs
	31	Motion of pltffs to compel answers by pltffs to interrogatories, filed—cs

DATE		PROCEEDINGS
1974		
Jun	5	Order dated June 4, 1974 on PRETRIAL CONFERENCE held same date that the prerequisites of Rule 23(a) and 23(b)(2) are satisfied and that this action may hereafter be maintained on behalf of all black persons who are nor or have within one year prior to filing of any charges under Title VII been employed by defendant Company or maintenance employees represented by the United Steelworkers; and granting leave to add as additional party defendant, International Association of Machinists; and granting leave for the intervention as a party plaintiff of an employee by the name of Humphrey—filed and entered (Pointer) cm
Jun	5	Notices (2) that deft will take the deposition of Clyde Humphrey at 9:00 a.m. and Louis Swint at 1:00 p.m., June 18, 1974, filed—cs
	12	Notice that plffs will take the deposition of deft company's plant manager at 10:00 a.m., June 17, 1974, filed—cs
	20	Amended complaint, filed
	20	Summons and complaint as amended issued—del to USM
	25	Deposition of Louis Swint taken on behalf of deft Pullman-Standard—filed
		Deposition of William Clyde Horton taken on behalf of plffs—filed
	28	Motion of deft Pullman-Standard to strike portions of amended complaint, filed—cs 7/8/74—Denied, paragraphs 1 & 3 being unnecessary & paragraph 2 denied on the merits (Pointer) cm
	28	Response of deft employer to request and supplemental request for production of documents, filed—cs

DATE		PROCEEDINGS
1974		
	28	Answer of deft Pullman-Standard to amended complaint, with jury demand thereon on issue of amount of recovery, filed—cs
	28	Supplemental answers of deft Pullman-Standard to first set of interrogatories filed—cs
Jul	1	List of witnesses of deft, United Steelworkers of America & Local 1466, filed—cs
	1	List of witnesses and documents which deft Pullman-Standard anticipates it may use at trial, filed—cs
	8	Further supplemental answers of deft employer to first set of interrogatories filed—cs
	8	On trial before the Hon. Sam C. Pointer, Jr. Answers (2) of defts to piffs' amended complaint filed. Depositions (3) of Clyde, Humphrey, Willie James Johnson and James R. Hudson filed. Oral order denying jury demand entered. Piffs' motion to compel declared moot. Piffs' testimony. Daily adjournment.
	9	Trial resumed. Piffs' testimony resumed. Daily adjournment.
	9	Summons & amended complaint returned, executed on 6/25/74 on International Association of Machinist and Aerospace Workers AFL-CIO and filed
	10	Trial resumed. Piffs' testimony resumed. Daily adjournment.
	11	Trial resumed. Piffs' testimony resumed. Defts' offer of deposition plus exhibits attached thereto, of Clyde Humphrey received by the Court. Daily adjournment.

DATE	PROCEEDINGS
1974	
12	Trial resumed. Plffs' testimony resumed. Defts' offer of deposition of Louis Swint received by the Court. Plffs' rest. Defts' oral motions for involuntary dismissal as to individual cases entered. Arguments by counsel. Plffs' second amendment to complaint filed. Service accepted on behalf of Local 372 by T. W. Horn. Daily adjournment.
15	Trial resumed. Oral order granting deft union's oral motion, and denying deft company's oral motion for involuntary dismissal of individual claims of Swint and Humphrey, entered. SCP. Defts' testimony. Daily adjournment.
16	Trial resumed. Defts' testimony resumed. Daily adjournment.
17	Trial resumed. Defts' testimony resumed. Daily adjournment.
18	Trial resumed. Defts' testimony resumed. Daily adjournment until Aug. 7, 1974, at 9:00 a.m.
Aug. 7	Trial resumed—defendants' testimony resumed—daily adjournment—
8	Trial resumed—defendants' testimony resumed—daily adjournment—
9	Trial resumed—oral motion by plaintiffs to limit defendants' Exh. 257 and 258—motion granted—defendants' testimony resumed—daily adjournment—
12	Trial resumed. Deft's testimony resumed. Daily adjournment.
13	Trial resumed. Deft's testimony resumed and completed. Union testimony begins. Daily adjournment.

DATE	PROCEEDINGS
1974	
14	Trial resumed. Deft's testimony resumed. Oral motion by plffs to limit deft's exhibit 351. Motion granted Daily adjournment.
15	Trial resumed. Defense rested. Plffs' rebuttal testimony. Testimony concluded. Daily adjournment.
16	Trial resumed. Final arguments heard. Case taken under submission.
Aug 16	Clerk's Court Minutes that this case is taken under submission. Written order to be entered by the Court—filed and entered—cm
Sept 13	Memorandum of Opinion filed and entered (Pointer) cm
13	Judgment in accordance with the findings and conclusions contained in the Memorandum of Opinion filed concurrently herewith that: 1. The Memorandum of Agreement of May, 1972 between the Department of Labor and Pullman-Standard is declared to be binding upon the union defendants; but eligibility under the agreement for transfers from the Janitors, Truck and Die & Tool (CIO) departments and for transfers to the Plant Protection, Inspection, and Air Brake & Pipe Shop departments shall be modified to include certain classes of employees as more fully specified in the Memorandum of Opinion. Liability, if any, for back pay in favor of persons benefited by such change in eligibility respecting transfers from the Janitors, Truck, and Die & Tool departments is severed for subsequent proceedings, as may be necessary, in accordance with procedures specified in the Memorandum of Opinion; but there is no just reason for delay as to the other issues in the case and entry of final judgment as to all

DATE	PROCEEDINGS
1974	
	such other issues is expressly directed. 2. In all other respects the claims of plaintiffs and of the plaintiff class are denied and the action dismissed with prejudice. 3. Each party to bear its own costs—filed and entered (Pointer) copies del to attys
16	Notice of appeal by plff from final order of U.S. District Court on September 13, 1974, filed—certified copies mailed
16	Bond for Costs on Appeal ($250.00) filed
23	Order pursuant to Rule 11(d) extending the time within which the record on appeal may be filed with the U.S. Court of Appeals for the Fifth Circuit of New Orleans 50 days from the 26th day of October, 1974—filed and entered (Pointer) cm
Dec 9	Transcript of the proceedings before the Hon. Sam C. Pointer, Jr. commencing on July 8, 1974, filed (6 vols.)
13	Transcript of the proceedings before the Hon. Sam C. Pointer, Jr. commencing on July 8, 1974, filed vols 7 and 8)
13	Certified record on appeal mailed to Clerk, USCA (7 boxes and one chart cylinder) copies of transmittal letter, docket entries & exhibit list mailed attys
1976	
Sept. 16	Cost Bill ($5,739.55)—filed by attys. for pltfs.
21	Motion of deft., Pullman-Standard To Defer Consideration of Costs—filed—cs del. SCP

DATE	PROCEEDINGS
1976	
24	Certified copy of judgment from 5th Cir. issued as & for the mandate, opinion attached—filed (affirmed in part, vacated & remanded in part; defts.—appellees to pay costs on appeal) Coleman, Clark & Gee
21	Exhibits (4 boxes) received from 5th Cir.—seem to be missing exhibits
Oct. 26	Order (Cert. copy) from 5th Cir. on motion of appellee, Pullman-Standard recalling 9/21/76 order & amending to provide that ¾ of the costs incurred by pltfs.-appellants shall be taxed to defts.-appellees and ¼ to pltfs.-appellants; remainder of each party's costs shall be borne by the party incurring same; except as recited above, the motion of appellee is denied—filed (Clark)
Nov. 9	Copy of Cost Bill ($7,348.40) from 5th Cir.—filed lrc
1977	
Jan. 13	Order that costs of plaintiffs on appeal ($5,686.45) are taxed 3/8 against the company defendant and 3/8 against the union defendant, briefs be filed simultaneously by all parties prior to 2-1-77 as to remaining issues discussed on 12-7-76 and that a hearing is set at 9 AM on 2-22-77 for taking additional evidence as to appointments to supervisory positions and statistical information, filed and entered. SCP—cm—add.
Feb. 10	Notice of pltfs. of Taking Deposition of Dr. Albert Wolfe on 2/16/77 in B'ham.—filed—cs lrc VACATED, see 2/17/77 entry

DATE		PROCEEDINGS
1977		
	17	Motion of Pullman Standard To Vacate Notice of Taking Deposition of Dr. Albert E. Wolfe—filed-cs GRANTED, 2/16/77 w/o objection by pltf.—SCP—cm lrc
	22	Hearing on remaining issues as to Supervisory positions and statistical information before the Hon. Sam. C. Pointer, Jr. Plaintiffs' agreements and job descriptions offered and received by the court. Defendant Company's testimony. Defendant company rest. No union testimony. Plaintiffs' rebuttal testimony. Daily adjournment. (Joe Marotta, Reptr.) add
	23	Hearing resumed. Plaintiffs' rebuttal testimony resumed. Plaintiffs rest. Evidence taken under advisement. (John Weaver, Reptr.) add Clerk's Court Minutes, filed. add
July	5	Memorandum of Opinion—filed (Pointer)-cm lrc
	5	Judgment in accordance with memo entering judgment in favor of defts.; each party to bear own costs—filed & entered (Pointer)-cm lrc
	15	Motion of pltf. for New Trial-filed-cs del. SPC lrc see 10/11/77 order
	15	Motion of pltfs. to Alter or Amend Judgment-filed-cs del. SCP lrs—see 10/11/77 entries
Sept.	7	Response of pltfs. to motion of company to clarify taxation of costs or to retax costs—filed-cs lrc del. SCP.
Oct.	4	Motion of Pullman-Standard to Clarify Taxation of Costs or to Retax Costs—filed cs del. SCP lrc DENIED; 11/16/77-SCP-cm lrc
	11	Memorandum of Opinion—filed (Pointer)-cm lrc

DATE		PROCEEDINGS
1977		
	11	Order granting new trial limited to seniority system under Sec. 703(h) of Civil Rights Act of 1964—filed & entered (Pointer)-cm lrc
Nov.	18	Interrogatories of pltfs. to Deft. Company on Seniority Remand Issue-filed-cs lrc
	21	Request of pltf. for Production by Local Lodge 372, IAM-filed-cs lrc
	21	Request of pltfs. for Production by deft. company-filed-cs lrc
	21	Request of pltfs. for Production by Steelworkers Union-filed-cs lrc
	21	Interrogatories of pltfs. to Local Lodge 372, IAM-filed-cs lrc
	21	Interrogatories of pltfs. to Steelworkers Union-filed-cs lrc
Dec	14	Request of plff for execution of judgment for plffs' court costs on appeal, filed
Dec	20	Answers of deft, Pullman-Standard, to interrogatories by plff, filed—cs lpc
	30	Notice that the plaintiffs will take the depositions of Mautman Herring, Colon Clemons, Bill Crockwell and Clyde Robertson, Jan 9, 1978, at Birmingham, Ala., filed. cs lhj
1978		
Jan	16	Deposition of Clyde A. Robertson taken on behalf of plff—filed lpc
	16	Deposition of Colon V. Clemons taken on behalf of plff—filed lpc

DATE		PROCEEDINGS
1978		
	16	Deposition of Johnny Joseph Mautman Herring taken on behalf of plff—filed lpc
	16	Deposition of William Harris Crotwell taken on behalf of the plff, filed skh
	16	Answers of deft, Steelworkers Union to interrogatories by plff, filed.—cs add
	16	On trial as to Seniority issue before the Hon Sam C. Pointer, Jr. (Dempsey, Repr.) Answers by defendants (Company & Union) to plffs' interrogatories that were filed 12-20-77 and 2-16-78 respectively, received in evidence by the Court. Deposition of Mautman Herring offered into evidence by plff and rec'd by Court. Deposition of Colon Clemons offered into evidence by plff and rec'd by the Court. Deposition of Clyde Robertson offered into evidence by plff and rec'd by Court. Deposition of William Crotwell offered into evidence by plff and rec'd by Court. Plffs' exhibits 1 thru 111 offered in evidence and rec'd by Court. Deft company exhibits 1 thru 27 offered in evidence and rec'd by Court. Defts' evidence put on by stipulation dictated into the record. Simultaneous briefs to be submitted to the Court by 2-16-78 and reply briefs to be submitted by 3-2-78. Case taken under submission.
	16	Clerk's Court Minutes, filed add
Feb	24	Writ of execution of judgment for plffs' court costs on appeal issued—del to USM for service skh
Mar	8	Request of plffs for judicial notice adjudicative facts, with attachments, filed—cs skh
May	5	Memorandum of Opinion (Pullman-Standard V)—filed and entered (Pointer) cm skh

DATE		PROCEEDINGS
	5	JUDGMENT in accordance with findings of fact and conclusions of law contained in Memorandum of Opinion filed concurrently herewith, is entered in favor of defts; each party shall bear its own costs—filed and entered (Pointer) cm skh
	15	Motion of deft, Pullman-Standard under Rule 52(b) for relief, filed—cs skh—SEE ORDER DATED 5/31/78
	25	Response of piffs to Pullman Standard's motion to amend judgment filed—cs-snh
	25	Amendment of deft, Pullman Standard, to motion, filed, with attachments—cs skh
	31	ORDER dated 5/30/78 that upon consideration of deft Pullman-Standard's motion, said motion is denied—filed and entered (Pointer) cm skh
Jun	21	Notice of appeal by piffs, Louis Swint and Willie James Johnson, etc. to Fifth Circuit from final order entered on May 5, 1978, and all prior interlocutory orders entered herein, filed—del to SPC lpc
	21	Bond ($250.00) for costs on appeal, filed lpc
	27	Transcript of proceedings before the Hon. Sam C. Pointer, Jr. on January 16, 1978 filed skh
Jul	28	ORDER that the time within which the record on appeal in this cause may be filed with the U. S. Court of Appeals is extended to and including August 11, 1978—filed and entered (Pointer) cm skh
Aug	10	Transcript of the proceedings before the Hon. Sam C. Pointer, Jr. commencing on February 22, 1977—filed skh

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 71-955

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,
Plaintiffs,

vs.

PULLMAN-STANDARD, Bessemer, Alabama; UNITED STEELWORKERS OF AMERICA, LOCAL 1466; and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants.

Jun. 20, 1974

AMENDED COMPLAINT

I.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(4) 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. §§ 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. § 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States to make and enforce contracts. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. §§ 151 et seq., based on violations of the duty of fair representation owed to plaintiffs and the class they represent.

* * * *

V.

(A) Defendant, Pullman Standard, is a Producer of railroad cars, doing business in the State of Alabama, and the City of Bessemer. The Company operates and maintains offices and plants and is an employer within the meaning of 42 U.S.C. §§ 2000e-(b) or (c) in that the Company is engaged in an industry affecting commerce and employs at least twenty-five persons.

(B) Defendant, International Union, United Steelworkers and Local 1466 is a labor organization within the meaning of 42 U.S.C. §§ 2000e(d) and (c) in that United Steelworkers, Local 1466 is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the Company at its plants and other facilities located in various cities and states throughout the United States, including employees of the Company's plants and other facilities in and around the City of Bessemer in the State of Alabama. The Local 1466, U.S.W. has at least twenty-five members.

(C) The International Association of Machinist and Aerospace Workers AFL-CIO, is the certified collective bargaining agent for the employees in the machinists' bargaining unit. It has at least twenty-five members.

VI.

(A) All matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs and the class they represent have been, at all times material to this action, governed and controlled by collective bargaining agreements entered into between the International Union, United Steelworkers, and the Company and/or local supplemental agreements (hereinafter referred

to as "agreements") entered into between Local 1466 and the Company. Under and pursuant to the terms of the aforementioned agreements, the defendants have established a promotional and seniority system, the design, intent and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the defendants' policy, practice, custom and usage of limiting the employment and promotional opportunity of Negro employees of the Company because of race or color.

(B) Defendant Local 1466 has failed and refused to properly represent its black members with respect to the matters herein complained of.

(C) The International Association of Machinist and Aerospace Workers, AFL-CIO is subject to service of process herein and its joinder will not deprive the court of jurisdiction under the subject matter of this action. In its absence, complete relief can not be accorded among those already parties. In addition, the said International Union has an interest relating to the subject of this action and it is so situated that the disposition of this action in his absence may as a practicable matter impair or impede its ability to protect that interest. Plaintiffs do not seek any monetary damages against this defendant.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 71-955

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,
Plaintiffs,

vs.

PULLMAN-STANDARD, Bessemer, Alabama; UNITED STEELWORKERS OF AMERICA, LOCAL 1466; UNITED STEELWORKERS OF AMERICA, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO; and LOCAL 372, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Defendants.

[Filed July 12, 1974]

SECOND AMENDED COMPLAINT

By leave of court previously granted, plaintiffs file this complaint, as twice amended.

I.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(4), 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. §§ 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. § 1981, providing for the equal rights of all persons in every

state and territory within the jurisdiction of the United States to make and enforce contracts. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. §§ 151 et seq., based on violations of the duty of fair representation owed to plaintiffs and the class they represent.

II.

A. Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of black persons who are employed, or might be employed, by the Pullman Standard Company at its plant located in Bessemer, Alabama, and who are members or might become members, of the International Union, United Steelworkers of America, and Local 1466, who have been and continue to be or might be adversely affected by the practices complained of herein.

B. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race and color. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. Defendants have acted or refused to act on grounds generally applicable to the class.

C. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant.

III.

This is a proceeding for a declaratory judgment as to plaintiffs' rights and for a preliminary and permanent injunction, restraining defendants from maintaining a policy, practice, custom or usage of: (a) discriminating against plaintiffs and black persons in this class because of a race or color with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant, Pullman Standard Company, who are members of International Union, United Steelworkers Local 1466, in ways which deprive plaintiffs and other black persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of race and color.

IV.

(A) Plaintiff Louis Swint is a Negro citizen of the United States and a resident of Bessemer in the State of Alabama. Plaintiff Swint has been employed by defendant, Pullman Standard at its plant in Bessemer, Alabama and is a member in good standing of International Union, United Steelworkers, Local 1466.

(B) Plaintiff Willie James Johnson is a Negro citizen of the United States and a resident of Bessemer in the State of Alabama. Plaintiff Johnson is and has been employed by defendant Pullman Standard, at its plant in Bessemer, Alabama and is a member in good standing of International Union, United Steelworkers, Local 1466.

(C) Plaintiff Clyde Humphrey is a black male citizen of the United States and a resident of the City of Bessemer, Alabama. He is and has been employed by the defendant, Pullman Standard, at its plant in Bessemer, Alabama and is a member in good standing of International Union, United Steelworkers, Local 1466.

V.

(A) Defendant, Pullman Standard, is a Producer of railroad cars, doing business in the State of Alabama, and the City of Bessemer. The Company operates and maintains offices and plants and is an employer within the meaning of 42 U.S.C. §§ 2000e-(b) or (c) in that the Company is engaged in an industry affecting commerce and employs at least twenty-five persons.

(B) Defendant, International Union, United Steelworkers and Local 1466 is a labor organization within the meaning of 42 U.S.C. §§ 2000e (d) and (c) in that United Steelworkers, Local 1466 is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the Company at its plants and other facilities located in various cities and states throughout the United States, including employees of the Company's plants and other facilities in and around the City of Bessemer in the State of Alabama. The Local 1466, U.S.W. has at least twenty-five members.

(C) The International Association of Machinists and Aerospace Workers AFL-CIO, is the parent organization of the certified collective bargaining agent for the employees in the machinists' bargaining unit. It has at least twenty-five members.

(D) Defendant Local 372, International Association of Machinists and Aerospace Workers, AFL-CIO is the certified collective bargaining agent for the employees of the machinists' bargaining unit at Pullman Standard's plant in Bessemer, Alabama.

VI.

(A) All matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs

and the class they represent have been, at all times material to this action, governed and controlled by collective bargaining agreements entered into between the International Union, United Steelworkers, and the Company and/or local supplemental agreements (hereinafter referred to as "agreements") entered into between Local 1466 and the Company. Under and pursuant to the terms of the aforementioned agreements, the defendants have established a promotional and seniority system, the design, intent and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the defendants' policy, practice, custom and usage of limiting the employment and promotional opportunity of Negro employees of the Company because of race or color.

(B) Defendant Local 1466 has failed and refused to properly represent its black members with respect to the matters herein complained of.

(C) The International Association of Machinists and Aerospace Workers, AFL-CIO and its local affiliate, Local 372 are subject to service of process herein and their joinder will not deprive the court of jurisdiction under the subject matter of this action. In their absence, complete relief can not be accorded among those already parties. In addition, the said International Union and its local affiliate have an interest relating to the subject of this action and is so situated that the disposition of this action in their absence may as a practicable matter impair or impede their ability to protect that interest. Plaintiffs do not seek any monetary damages against these defendants.

(D) Plaintiff Clyde Humphrey alleges that he was discharged by the company on November 10, 1972 because of his race or color. He filed a grievance concerning this discharge; and his grievance was upheld by an

arbitration award dated November 20, 1973. However the award failed to accord back pay to plaintiff Humphrey for the period of his unlawful discharge. Plaintiff Humphrey had earlier filed a charge of discrimination against the Company and Local 1466 of the Steelworkers, alleging that he was discriminatorily assigned to perform various duties. We received a notice of his right to sue on March 27, 1974.

VII.

(A) The effect, purpose and intent of the policies and practices pursued by the Company have been and continue to be to limit, segregate, classify and discriminate against Negro workers at its Bessemer, Alabama plant in ways which jeopardize the jobs of and tend to deprive the said Negro workers of equal employment opportunities and otherwise adversely affect their status as employees because of their race and color.

VIII.

(A) The Company discriminates against blacks in awarding temporary assignments by giving blacks less desirable jobs and depriving them of training in the more desirable jobs.

(B) The Company maintains a policy, practice, custom, or usage of segregated facilities and of utilizing physicians with segregated facilities.

(C) The Company discriminates against blacks in its hiring policies.

IX.

Plaintiffs and the class they represent are qualified for promotions and for training which could lead to hiring and promotions on the same basis as such opportunities are provided for white employees.

X.

(A) On various dates, including but not limited to the following: October 15, 1969, May 11, 1970 and July 31, 1970, plaintiff Louis Swint filed written charges, under oath, with the Equal Employment Opportunity Commission alleging denial by defendants of plaintiffs' rights under Title VII of the "Civil Rights Act of 1964," 42 U.S.C. §§ 2000e et seq.

(B) On or about September 22, 1971, plaintiff Swint was advised that he was entitled to institute a civil action in the appropriate Federal District Court within thirty (30) days of receipt of said letter.

(C) Neither the State of Alabama nor the City of Bessemer has a law prohibiting the unlawful employment practices alleged herein.

XI.

At all times material herein Local 1466 and the International Union, United Steelworkers of America have been the certified recognized representatives under the National Labor Relations Act of the plaintiffs and the class they represent and, as such, have the duty, under the National Labor Relations Act, to act impartially and fairly represent the interests of plaintiffs and the class they represent.

XII.

Defendants International Union, United Steelworkers of America and Local 1466 have violated and continue to violate their duty of fair representation imposed on them by the National Labor Relations Act in that they have acquiesced and/or joined in the unlawful and discriminatory practices and policies complained of herein and they have failed to protect the Negro members of the Company from said discriminatory policies and practices. The Company has knowingly participated in or

acquiesced in said violation of the duty of fair representation.

XIII.

After the service of charges herein upon the Company, it implemented a scheme of systematic harrassment and intimidation of plaintiff Louis Swint, as a reprisal for his having filed the said charges. This policy led to the ultimate discharge of plaintiff Swint by the Pullman Company, in retaliation for the charges he filed.

XIV.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, customs and usages as set forth herein.

XV.

WHEREFORE, plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiffs and the class they represent a preliminary and permanent injunction enjoining the named defendants, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing to abridge the rights of plaintiffs in respect to compensation, terms, conditions and privileges of employment and from limiting, segregating and classifying plaintiffs and the class they represent in ways which deprive plaintiffs and other black persons of this class of equal employment oppor-

tunities and from otherwise adversely affecting their status as employees because of race and color.

2. Grant plaintiffs and the class they represent a declaratory judgment that the actions of defendant complained of herein violate the rights of plaintiffs and the class they represent guaranteed by Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

3. Grant plaintiffs and the class they represent relief requiring defendants to make whole, by appropriate reinstatement and immediate promotion, backpay, and otherwise, all such individuals who have been adversely affected by the practices and the policies herein complained of from the time of defendants' wrongful denial of employment to the present.

4. Allow plaintiffs, their costs herein, including reasonable attorneys fees as provided in Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) and other additional relief as may appear to the Court to be equitable and just.

/s/ U. W. Clemon
U. W. CLEMON
ADAMS, BAKER & CLEMON
Suite 1600 - 2121 Building
2121 Eighth Avenue, North
Birmingham, Alabama 35203

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 71-955-S

LOUIS SWINT and WILLIE JAMES JOHNSON, on behalf of themselves and others similarly situated,
Plaintiffs,

vs.

PULLMAN-STANDARD, Bessemer, Alabama, *et al.*,
Defendants.

Jul. 8, 1974

ANSWER OF DEFENDANT INTERNATIONAL ASSOCIATION OF MACHINISTS AND AREOSPACE WORKERS, AFL-CIO

Comes now defendant International Union of Machinists and Aerospace Workers, AFL-CIO, and for answer to the amended complaint filed herein, states as follows:

1. Defendant denies each and every allegation of the amended complaint, except Paragraphs V(C) and VI (C), which are the only portions of said complaint which contains any allegation concerning defendant.

2. As to the allegations of Paragraph V(C), defendant admits that it has at least 25 members, but states that its Local Lodge, rather than the International Union, is actually the certified collective bargaining agent for various employees at Pullman-Standard.

3. As to the allegations of Paragraph VI(C), defendant admits those allegations, except to the effect that it is not the bargaining agent as explained above.

4. Defendant denies that it has violated Title VII of the Civil Rights Act of 1964, as amended, or the Civil

Rights Act of 1866. Defendant further denies that it has discriminated against any member of the Machinists' bargaining unit or any other black employee of Pullman-Standard.

5. Defendant submits to the jurisdiction of this Court, understanding that no claim for monetary relief of any kind is made against it, and offers to abide by any decree which may be entered by this Court.

6. Defendant reserves the right to call witnesses at the trial, although it has not had sufficient knowledge of the claims against it to enable it to comply with the Court's pretrial order requiring the listing of witnesses ten days prior to the trial.

COOPER, MITCH & CRAWFORD

By /s/ John C. Falkenberry
JOHN C. FALKENBERRY

409 North 21st Street
Birmingham, Alabama 35203
328-9576

Attorneys for Defendant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CA 71-P-955

SWINT, ET AL.

v.

PULLMAN-STANDARD, ET AL.

SUPPLEMENTAL PRE-TRIAL CONFERENCE
HELD JUNE 4, 1974

1. *Counsel.* The following counsel were present: For plaintiffs, U. W. Clemon; for defendant Company, C. V. Stelzenmuller; and for defendant Steelworkers Union, John C. Falkenberry.

2. *Class Action.* The parties have made known certain facts to the court and have agreed that such facts may be considered by the court without formal hearing otherwise required under Rule 23. On the basis thereof, the court finds and concludes that the prerequisites of Rule 23(a) and 23(b)(2) are satisfied and that this action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company as production or maintenance employees represented by the United Steelworkers. The court concludes that individual notification of class members is unnecessary in this action under Rule 23(b)(2) but that it would be appropriate for a general notification of the pendency of this litigation to be posted at the premises of the Company. Counsel for the parties shall attempt to draft such a notification and in the event of disagreement the same shall be presented to the court for its approval.

3. *Parties.* Leave is hereby granted to the plaintiffs to add as additional party defendant (insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company, it being noted however that no request for monetary relief is being sought against said Union) the appropriate entity of the International Association of Machinists. Leave is also granted for the intervention as a party plaintiff of an employee by the name of Humphrey for the presentation of his claim under Section 1981 with respect to his discharge and subsequent reinstatement without back pay.

4. *Issues.* The following charges are made by the plaintiffs as violations of either Title VII or of Section 1981:

(a) That a system of departmental seniority, even with changes made pursuant to a corrective action program with the Department of Labor, nevertheless perpetuates the effects of past discrimination in the assignment of black employees to generally less desirable departments. This issue subsumes the following assertions by the plaintiffs:

> The transfer provisions under the agreement with the Department of Labor apply to only four departments; the transfer rights which are granted under such plan are inadequate by reason of the failure to provide red-circle rates and by reason of the restriction to a single exercise of such rights; and such rights of transfer do not apply to jobs in the machine shop represented by the IAM. (The issue relative to the machine shop may have to be severed for subsequent trial depending upon the joinder, service, and availability and readiness of the IAM with respect to the trial date already scheduled.)

(b) The Company has discriminatorily made assignments of functions to persons serving in the

same job classification based on race and has discriminatorily assigned persons on the basis of race to "lateral" job classifications having the same job class.

(c) The Company has discriminatorily failed to promote black production and maintenance employees to supervisory and managerial positions.

(d) As individual, non-systemic, claims, the Company has discharged the plaintiff Swint in violation of Title VII or Section 1981 and has discharged (without giving back pay or reinstatement) the potential Intervenor Humphrey in violation of Section 1981.

The plaintiffs seek back pay or other monetary relief incident to the foregoing claims of discrimination; but such issue is severed for trial, if necessary, at a subsequent date. The plaintiffs, in view of proposals made by the defendants in conference, do not intend to challenge the practice by which daily assignments and vacancies have not been publicly posted; but reserve the right to present such an issue at trial if the conference proposals by the defendants prove to be unsatisfactory.

The defendants deny the several charges of discrimination set out above and in addition assert defenses in part based upon applicable statutes of limitation and the effect of arbitration awards.

5. *Discovery.* The parties are given leave to proceed with further discovery provided the same be completed at least ten days prior to trial. The parties shall at least ten days prior to trial exchange a list of witnesses and documents which they anticipate utilizing at trial.

Done this the 4th day of June, 1974.

/s/ Sam C. Pointer, Jr.
SAM C. POINTER, JR.
United States District Judge

TRANSCRIPT OF 1974 TRIAL

BEFORE THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

[2] Mr. John C. Falkenberry, of the firm Cooper, Mitch & Crawford, 409 North 21st Street, Birmingham, Alabama and Messers. D. Frank Davis and C. V. Stelzenmuller, of the firm Thomas, Taliaferro, Forman, Burr & Murray, Birmingham, and Mr. Franklin B. Synder, 200 South Michigan Avenue, Chicago, Illinois, 60604, appearing on behalf of the Defendants.

* * * *

[3] PROCEEDINGS

July 8, 1974 10:00 A.M.

MORNING SESSION

THE COURT: * * *

* * * *

[6] The Grand Lodge of Machinists has been named as a party defendant in this case for the limited purpose that a part of the relief sought by the plaintiffs may involve some modification to the collective bargaining agreement between the Machinists and the defendant company. The Grand Lodge has indicated that it submits to the jurisdiction of the Court for that limited purpose, not agreeing that any such changes are due to be made, but acknowledging merely that the Court would have power to make such a change if it otherwise [7] was merited by the evidence in the case, and subject further to the fact that the local lodge of the Machinists which apparently is the certified labor union at Pullman-Standard, has not been made as a party defendant and the plaintiff is however given leave, if it desires, if they

desire to do so, to add the local lodge as an additional party defendant, again only for the limited purpose that relief in the form of some modification of the collective bargaining agreement is a part of the requested relief which the plaintiff seeks. That amendment, however, if one be made, should be made I think during this week so we do know what the status is.

* * * *

[400] MS. PRIVETT: I call Harvest Morgan.

MR. HARVEST MORGAN,

being first duly sworn, testified as follows:

* * * *

[402] Q All right. What is your job class now?

A I'm in the Job Class 11, rivet driver.

Q All right. Mr. Morgan, have you ever served as a temporary foreman?

A I most certainly has. In 1971 we were put on the night shift, and I was promoted to supervisor to run the sides and ends job. And I run that job close to two years. * * *

* * * *

[424] Q As a matter of fact, Mr. Morgan, you couldn't make production if everybody just chose up sides like on a ball team, could you, as to where they want to work?

A No. You couldn't make production if you didn't have the men in the right place and right men to do the job, you wouldn't.

* * * *

[832] MISS PRIVETT: I call Tommy Williams, Jr.

MR. TOMMY WILLIAMS, JR.,

being first duly sworn, testified as follows:

* * * *

[860] Q So a fellow just doesn't go all over that side and do whatever strikes his fancy, he sticks to what he is doing, he sticks to one thing usually?

A Say he do what now?

Q I say, any member of that twelve man team that you have, they kind of do the same thing on each seal, don't they?

A Well, they have a job there to do, right.

[861] Q That's right. If I am working on this end, the next time the seal comes down there I wouldn't go down to the other end and start riveting down there, would I, if I was a riveter? You sort of do the same thing over and over again?

A I just stated that everybody has got a job, you know. You have got a job and they got another job on the other end doing the same thing.

Q And that is part of the teamwork, isn't it, that piece after piece you can get more production because you get used to doing that exact little set of duties, isn't that right?

A What do you mean by used to doing?

Q What I am saying is, if you swap with another man, it will take you a little while to get used to what he is doing.

[862] A Well, for some people. See, I can do it all. For some people, you know, that haven't did, these people they mess around sometimes, you know, but you just don't get a man and you know, just like you are saying, just move around from one job. He got a specific job, I got a job, and sometime occasionally I would go on the other end of the department and drive a few rivets.

Q Kind of like a football team, people work together; they do different things, and they do them together. As the work together, they get better, don't they?

A That is right.

Q And that is the way it works?

A All the time, I guess.

Q And if you had every man to be able to switch from end to quarterback, that would mess everything up?

A All depends upon whether you know what you would call understanding about what is going on all the time.

Q That is right.

Everybody perfect, it woudn't matter, but [863] they are not, are they?

A That is right, you are right.

Q I don't think any of us are?

A Not any of us; capable of making mistakes, big mistakes.

Q That is another thing, you kind of reduce the number of mistakes if you are sticking to bucking these particular set of holes or particular set of rivets. It avoids mistakes because you get real familiar with what you are doing on that side sill, don't you?

A Yes.

Q And if there was some system set up where every day you just choose up sides and say, somebody would be working in the paint department wants to come down and work in the steel construction, it wouldn't be likely to be something that would work out very well, would it?

A All depends on if he is familiar with the job.

* * * *

[865] Q Well, let me ask you if it isn't true that [866] at sometimes you say you start up a new order and you get assigned and you have some green men with your crew, or let's just say you might even have a bunch of men that didn't know each other and hadn't worked together, takes you a while before you can get through by 1:30 or 12 o'clock; doesn't it?

A Right.

Q At the very outset of a new order, if you have green men that you are not familiar with, might be good men, but not familiar with working with each other, you could just see how every day maybe you get through a

little bit earlier with your daily quota and you get down to where after the order starts, you get down to where you are really cutting the mustard then, is that true?

A That is right.

Q Sometimes if you start out an order and some green men are on there, you might have to work until 3:15?

A Right.

• • • •

[1200] MR. CLEMON: Mr. Lewis Pinkard.

MR. LEWIS PINKARD,

being first duly sworn, testified as follows:

• • • •

Q Where do you now work?

A Pullman-Standard.

[1201] Q When did you go to work for Pullman?

A July, '62.

• • • •

[1203] • • • What is your present position if any with the union?

A Grievance committeeman.

• • • •

[1212] Q When were the bath houses integrated at Pullman?

A Well, they were left open for blacks and whites in 1968, but they weren't integrated yet.

Q Prior to 1968 had the bath houses at Pullman been segregated?

A Right.

• • • •

[1226] MR. STELZENMULLER: We call Mr. Don Frederick.

MR. DONALD D. FREDERICK

being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q (BY MR. STELZENMULLER) What is your full name?

A Donald D. Frederick.

Q And Mr. Frederick, you are employed by Pullman-Standard?

A Yes.

Q Out at the Bessemer plant?

A Yes.

Q What is your position there?

A Assistant plant manager.

Q How long have you held that position, Mr. Frederick?

A I have held this position nine years. I have been with the company eighteen.

* * * *

[1227] Q Mr. Frederick, just by way of introduction of this, can you give us a general description of the Pullman-Standard car plant in Bessemer and a description of the general nature of the manufacturing process and any unusual characteristics of it?

A Yes, I think I can.

Q Would you tell the Court what type of plant that is, and any characteristics of the production process in general that are significant to its operating methods?

[1228] A Well, at the present time the plant employs approximately 2800 people in 22 departments. These departments, although unrelated in the individual skills required collectively form the team at Pullman-Standard. The skill and efficiency demonstrated in each individual department in accomplishing its own tasks determine how well the team functions in the one common goal of building a quality freight car to the railroad specifications and maintain customer satisfaction in a fairly high competitive field. The freight car manufacturing business is unlike any other business of its size. It functions more

like a small contract fabricator, and that each order or lot as we refer to them is estimated, bid and engineered to meet the individual railroad specifications for the car to be built. This carries on through the manufacturing operation also in that jib, engineering, die engineering, manufacturing, planning, the application of labor by rate department, varies with each order. The orders will vary in size from possibly 25 cars to several thousand. The Bessemer plant is probably [1229] as versatile a plant as there is in the world. It has built many types of cars, such as boxcars, flat cars, gondolas, open hopper car, covered hopper cars, as well as too many variations of these basic cars to mention here. The variety of cars and the fact that cars are custom built makes it impossible to stock any quantity of material or to build any cars for inventory. It just becomes economical and a physical impossibility. The freight car building business is unique compared to other businesses of its size in that it has only one customer, the nation's railroad. Thus as the railroads go pretty much as the way Pullman-Standard goes. I believe anyone who has worked for, lived in the vicinity of a car plant can attest to the cycle and the inherent layout problems it creates. Also the reverse problem, the procurement of people in building a quality car. This external cyclical nature is fairly evident to everybody around it which is created mainly by the purchasing power, lack of or intensity of, but I believe a more subtle internal cycle of labor movement is I believe—this is even greater [1230] than the external cycle. These occur at any production level, even with peak order book and peak production. This is a very difficult cycle to try to explain verbally, but I would like if you bear with me, I will attempt to explain it as simply as I can. The cycle, or more appropriately the cycles that the applications and reduction of labor on any given lot of cars will simulate, is that of possibly three sign waves, displacement in time and varying in magnitude.

The first wave starts on the steel erection track, and if you will try to picture this, it starts at—in a valley in terms of labor application due to the changeover of the track on jigs, fixtures, handling equipment from the requirements of one type of car to the requirements of the following car. This time can vary from a few hours to several weeks, but usually is done within one week. The magnitude of the wave begins to build as the new car proceeds down the production line through in the case of a boxcar some eighteen positions and will continue to build in magnitude [1231] until such time the car reaches the set task or number of cars produced for that day, for each day.

The second wave in a case of a boxcar is generated at the wood erection where any interior equipment that is required in the car is installed. This wave starts in a valley approximately a week to ten days after the steel erection starts. This valley is created by both the difference in the cars and the absence of cars having been produced on the steel erection track during a changeover. The same type of build up in manpower then occurs into up to 24 positions as had occurred on the steel track. In recent years with the exodus of wood, these people have been mainly welders and steel erectors.

Then the third wave which comes about after cars start to come out of the erection—the wood erection area which normally would follow it by a week to ten days ago, start when the cars go successively through the shot blast, prime paint, finish paint, stencil, and finally come to the shipping track. Now what does all this mean? [1232] It means say in the case of the welding department, which is our largest department, it is approximately 800 people, that the manpower requirements for this department are being generated by three different waves with peaks and valleys occurring at different times. The combination of these waves again in terms of the welding department generates a wave of require-

ments that is rather irregular in nature when you combine the three waves. Considering also that it takes approximately 100 cars started on erection track before the first car is on the shipping track, we can get some idea of what the frequency of this wave can be. Many times when the first car hits the shipping track, the last car is on the erection track. This represents as descriptively as I can put it what happens in terms of one line of cars.

To look at the overall picture, we must understand the phenomena is occurring on two other lines at the same time with none of the peaks and valleys coinciding. Here again in the case of the welding department, if all the waves generated by the three tracks were combined, they [1233] would generate a very complicated wave of requirements in terms of manpower, both in magnitude and chain. And to explain the many movements of manpower to satisfy production needs, this is a difficult chart or graph to ever draw because it spells out magnitude, but it dosen't spell displacement between waves in terms of labor. I imagine probably these rapid changes in manpower recognized years ago by the labor and management are why the five day and two day clauses were injected into our labor contract. The five day clause provides that if a man also is laid off due to a track change, he need not be placed in an already producing order if he is to be recalled within five days. The two day provision allows two days to place a man on a production order if he is not to be recalled in two days—in five days. Both of these clauses tend to smooth out the movement of manpower and level out a few of the ripples caused by these waves and create a less effect on quality and production when movements do occur. I think these are probably the biggest single items that are unique to the car building business. I don't know of another industry [1234] that operates as singly, yet has to operate so totally on a production line basis. I believe this will de-

scribe the uniqueness of the shop, and I would like at this time if the Court would permit, to walk through a pictorial plant tour in which we can maybe explain some of the physical characteristics of the car plant.

• • • •

[1392] MR. STELZENMULLER: Call Mr. F. B. Snyder.

FRANKLIN B. SNYDER,

having been first duly sworn, was examined and testified as follows:

• • • •

DIRECT EXAMINATION

• • • •

Q By whom are you employed?

A Pullman, Inc.

Q In what capacity and in what office, what city?

[1393] A I'm a lawyer with their law department in Chicago.

Q And since you have been in the law department there since September, 1962, have you had any particular area of responsibility?

• • • •

[1394] A I have filed and worked with the various plants in our company in the different divisions, the developments under the Civil Rights Act, and the various executive orders which are imposed upon government contractors. I have attended reviews, compliance reviews. I have worked on the affirmative action plans and programs for different locations.

Q And let's see, your company has a plant, car building plant in Butler, Pennsylvania, does it not?

A Yes, sir.

Q How many blacks are employed there presently, if you know?

A At present there are about nine out of the entire force.

[1395] THE COURT: I am having difficulty hearing.

A I am sorry, Judge.

THE COURT: You will have to speak up.

A About nine Negro employees on the Butler payroll.

Q The plant is somewhat smaller than Bessemer but has a payroll upward of a thousand, I take it?

A Oh, yes, it is larger than that.

• • • •

[1461] July 16, 1974 9:00 A.M.

MORNING SESSION

THE COURT: I believe there is to be an announcement on behalf of one of the union defendants.

MR. FALKENBERRY: Yes, sir, may it please the Court.

On Friday an amended complaint was served on Mr. Horn who is the president of Machinists Local Lodge 372, if Your Honor please. I represent that local lodge, although I have not formally filed an answer, I will do so if I might just state for the record my appearance in the event that I may want to propound questions on behalf of that local as well as the international.

THE COURT: Mr. Snyder, are you ready to resume the stand?

MR. SNYDER: Yes, sir.

• • • •

[1463] Q And it was after the union was unable to satiafy the government regarding its proposals that it indicated finally that it would not sign the same agree-

ment that the company had signed in January of 1969?

A That's right, sir.

• • • •

[1464] CROSS EXAMINATION

Q (BY MR. CLEMON) Mr. Snyder, what specifically were the proposals that were made by the union in 1969?

A As a negotiating move in relation to the government, the union suggested a form of transfer possibilities which did not entail taking plant seniority anywhere in the plant, but it was a somewhat broader proposal in the sense of offering transfers to employees than the government ended up with.

Q Was the union in effect proposing that a member of the affected class who wished to transfer should be allowed to transfer to any department and enter that department as a new man?

A I don't believe that it was expressed in terms of an affected class at all.

• • • •

[1465] Q But once they entered the new department, they would enter in effect as a new man at the bottom of the seniority list for that department?

[1466] A That was the suggestion, yes, as covered obviously Negroes and whites.

Q Were there any other seniority proposals which were made by the union at that time?

A I don't remember any.

• • • •

[1472] Q Now, Mr. Snyder, is it a fair statement that in 1972 the OFCC Agreement is virtually identical to the 1969 agreement?

• • • •

Q Red circling was eliminated from the 1972 agreement?

A That is right. It is not in that agreement.

* * * *

[1770] MR. STELZENMULLER: Call Mr. Debrow.

HARRY E. DEBROW, SR.,

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. STELZENMULLER:) State your name, please, sir?

A Harry E. Debrow, Sr.

Q And where are you employed, sir?

[1771] A Pullman Standard, Bessemer.

Q How long have you been employed by Pullman Standard?

A Thirty-three years.

* * * *

What is your present position, Mr. Bebrow?

A Assistant Contract Compliance Officer.

* * * *

[1882] Q When did the Union the steelworkers union organize that plant or begin to represent employees, if you know, Mr. Debrow?

[1883] A As I recall, it was in the early 40's.

Q Did you have any personal knowledge about that?

A Yes. I was involved in organizing it.

Q All right.

For the United States Steelworkers?

A Right.

Q And what took place there, Mr. Debrow, were negroes active in organizing that plant?

A Negroes organized Local 1466.

Q Did you have—in other words, the movement began with Negroes, to your knowledge?

A It did.

Q And did you have an election out there conducted by the National Labor Relations Board?

A That is to determine we would have the bargaining rights, with that election.

Q I take it they had one election for the machine shop people, which the machinists wanted, and another for the other P & M employees?

A I believe that is about the gist of it.

Q Following the election in which the steelworkers won for that group, right?

[1884] A They won the right to bargain, represent—people they are representing today.

Q Have Negroes taken an active part and held offices, stewardships, committeemen and all that, ever since?

A To my knowledge, every office in there has been filled by Negroes at one time or another, and this organizing of it was all Negro. We didn't have a single white officer.

Q Let me ask you if the stewards in the plant have not been proportionately Negro anyway, or largely Negro ever since 1941?

A Well, I couldn't see been proportioned one way or the other. We have had a lot of each race.

Q Not been any particular distinction, been a lot of both races?

A Been a lot of both races from time to time.

* * * *

[1964] MR. HENRY VANN, JR.,

being first duly sworn, testified as follows:

* * * *

[1967] Q Now what is your present job?

A You mean at the present?

Q Right now.
A Foreman, A Foreman.
Q In the welding department?
A Welding department.

• • • •

[2001] Q Mr. Vann, you had quite a bit of ups and downs in the work force out there, don't you?
A That's right.
Q And you see on this chart here, that pretty illustrates how the plant can go down almost less than a hundred men and on up to 2,800?
A Right.
Q And this means that there is a lot of times when new forces come in that have to be placed in different departments and positions, don't they?
A That's right.

• • • •

[2002] Q Based on your experience in training as a welder, and in your observation of the operations in the welding department, Mr. Vann, do you have an opinion as to what would happen to—what effect would there be on the operations in that welding department if on a recall of a large number of men they were placed throughout the plant according to how long they had been in the plant and without respect to departments?
A You couldn't operate it.
Q You don't think the welding department could operate it?
A No.

• • • •

[2010] Q On the track who decides where a man is going to weld? Say here is the foreman and here is a railroad car, here is a position.
A The foreman designates, you know, that he is supposed to weld. Each man is supposed to have a certain amount of welding on each car.

Q And in that—in this situation are there some people who—well, does he try to maintain [2011] the same position?

A Try to balance it.

Q He don't swap them around every day or anything like that?

A No, you can't do that.

Q Why is that?

A Well, if you do that, you just can't get anything done. See, we have a certain amount of time. Say for instance we have sixteen car lineup, you have thirty minutes at each car, and say for instance if you are on the roll-over, and you have got a man doing this welding, probably corner caps, you know, welding on top of the car, or welding the back part of it, you just can't keep swapping around because you would be losing time.

Q Isn't it kind of like a football team, you have eleven good players, can all play football, but if they get used to playing end, you can't switch them to quarterback?

A Right. You can't designate a certain area for them to work where every man would know his job.

Q Mr. Vann, you have seen many cars built [2012] out there, haven't you?

A Oh, yes.

Q Isn't it true that when you first start up a line, even if you have got all experienced people, and there is a period where you are not making production, why is that?

A Well, first of all in building cars, sometime we get an order that we have never, you know, had at this particular car.

Q It is a little different?

A It's a little different. It's your different items and so forth that goes on it. And each foreman, you know, has a set of blueprints, manpower that he is supposed to use, and he has to in turn show the individual what that he has to do to the car.

Q And does it take each individual a little time to get just used to doing that particular operation?

A It does.

Q And after awhile I guess he gets to where he can just make production and do it real easy?

A That's right.

Q And start on another order, the same man, [2013] he is going through the same thing again?

A That's right.

Q And if you have say ten different positions, you have kind of got to move at a pace of the slowest man as far as pulling cars is concerned?

A That's right.

Q So Mr. Vann, if you were to switch these things around very frequently, is that why you're saying you couldn't make production?

A You couldn't.

* * * *

[2018] Q So, the more you can keep a fellow doing the same general type work, the less you are going to have cripples, as a rule?

A That is true.

Q And we are talking now about not just doing welding, but talking about specific welding assignments, and making that car?

A Right.

* * * *

[2135] MR. STELZENMULLER: Mr. Dick Snyder.

RICHARD C. SNYDER,

having been first duly sworn, was examined and testified as follows:

* * * *

Q By whom are you employed?

A Pullman-Standard.

Q In what capacity and what place?

A My present capacity is supervisor of engineering at Camp Carry Technical Center in Hammond, Indiana.

Q What is done up there at this Technical Center?

A One of the functions which I am involved is [2136] the engineering of freight cars. My particular function is the design and engineering of boxcars.

Q Now, how long have you been working for Pullman?

A 23 years. I started January, 1951.

Q Where was that?

A At the Pullman Standard Plant in Michigan City, Indiana.

Q What kind of plant was that or is that plant?

[2137] A Well, the plant no longer exists, but at the time I started it was primarily a boxcar plant.

Q Making boxcars, the same general nature as those at Pullman?

A Yes, sir.

Q And what kind of work were you doing in January of '51?

A I started in January, '51 in the jig and fixture design department, engineering work.

Q And this involved making fixtures for use out in the plant, right?

A Yes, sir.

Q In other words, your work took you out in the plant a good deal of the time?

A Yes, sir. All the time I was at Michigan City, I was out in the plant quite a bit. At least once a day generally speaking.

Q Now tell me Mr. Snyder, do you—are you generally familiar with the way jobs were assigned up there and the general nature of the seniority system?

A I had the general knowledge because I had to [2138] work with the people of the overall assignments of jobs, not the detailed classifications and so forth, but

I knew at Michigan City the general assignments, yes, sir.

Q How did people—did they have a union contract?

A Yes, sir.

Q How did people apply the seniority, that is in what kind of grouping?

A Well, Michigan City, they had a departmental seniority, and each job was bid on by each individual and this was done on a daily basis.

Q As I take it, like if a vacancy occurred one day, then you would have—

A Every morning before the track started, there was a bidding procedure that took place prior to the start of the production track, to get the force established, and start their daily tasks.

Q And did this procedure consume much time?

A It was very disorganized. In fact, generally speaking the track never started at 7:00. It was usually 8:00, 8:30 before the track [2139] generally started.

Q Now did they have more than one erection track up there?

A They had two erection tracks. And at times there was one track going and at times there were two tracks going.

Q When they changed from one track to two track operations, did this have any effect on the complexity of getting organized?

A Well, it complicated the situation where you would get employees—production employees going from one track to obtain the better jobs.

Q Whatever they picked out?

A That's right. Through their seniority and their bidding of the job.

Q Let me ask you if you know was—were many mistakes made, that is many controversies arise about this thing?

A It varied. We had quite a few cripples. Especially at the end, prior to the closing of Michigan City plant, our quality was greatly affected by this, and we spent a great deal of [2140] additional labor repairing cripples.

* * * *

[2142] Q Was it an unusual number of chalk marks per car, compared to, say, Bessemer, if you have been there?

A Well, actually I think the quality—if you are asking me about the quality, I think the quality was—prior to the closing of Michigan City, was very bad, and much worse than anything I have ever seen at Bessemer.

* * * *

[2189] Q Well, now, Mr. Glaser, if you were to adopt a form or something similar to what they had at Michigan City, do you believe you could maintain the quality of product that you have at Bessemer?

A No, sir, I do not; I would have to say that based on our experience with the Michigan City Plant, that were we in a labor situation that pre- [2190] vailed at the Michigan City Plant, we would not be able to maintain our share of market that we enjoy now.

* * * *

[3498] MR. FALKENBERRY: I call Mr. Ross Hammonds.

ROSS D. HAMMONDS

being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q (BY MR. FALKENBERRY:) Will you state your name, please, sir, and where you work?

A Ross D. Hammonds. I work at Pullman-Standard, Bessemer, Alabama [3499] Q Mr. Hammonds, how long have you worked for Pullman-Standard?

A Twenty-eight years and four months.

Q From that I take it you went to Pullman about 1946?

A Right.

Q Would that be correct?

A February 4, '46.

Q When you first went to Pullman, Mr. Hammonds, was there a union there?

A It was.

Q And what union was that, please, sir?

A Well, it was United Steelworkers, but it wasn't fully organized as it is now.

Q Well, it was back—was it back when they had the old steelworkers acting committee under the old CIO?

A That's right.

Q Did you join the union when you went?

A Sure I joined. You had to slip around and sign cards from different ones that was carrying union cards around to become a member.

Q And you did slip around and sign a union [3500] card sometime in 1946, after you began at Pullman?

A March of '46.

Q All right, sir. At that time in 1946, Mr. Hammonds, was—do you recall whether the union was composed primarily of black employees at Pullman or primarily of white or of about an equal mixture; what was the racial composition of the union at that time?

A It was integrated.

Q Would you say there were more blacks than whites or more whites than blacks in the union?

A There was more whites. There were three white and two black in the top five.

Q That is officers. I'm just talking about the membership.

A Oh, the membership as a whole?

Q Was it mostly black?

A It was mostly black at that time.

Q What I understand you to say about three whites and two blacks, were you referring to the—

A Elected officers.

Q Elected officers at the union?

A Right.

[3501] Q To your recollection, Mr. Hammonds, has that always been the case about the officership in Local 1466, that is, that they have been integrated from 1946 when you first began to work at Pullman?

A As far as I know up until '73 of July.

Q Who were the union officials back when you joined the local?

A When I joined the local, the president was J. M. Herring. He is white. Vice president was Perry Thompson, black. Recording secretary was John Hubbard, which was white. The financial secretary was Pete Quick which was white. The treasurer was—I mean the financial secretary—I want to back up on that, financial secretary which was black was Gus Dickerson, Sr.

Q Right.

A And the treasurer was Pete Quick, white.

Q Now over the course of your membership in the steelworkers, Mr. Hammonds, and in the course of your employment at Pullman-Standard, have you held both elected and appointed offices in Local 1466?

[3502] A I have.

Q Tell us if you will what the first position you ever held was and when that was, if you can remember exactly what it was?

A In 1952 I was elected by the members of the steel erection department as shop steward.

Q How long did you serve just as a shop steward?

A Twelve years.

Q After you were a shop steward, did you hold other offices?

A I was appointed by the local union executive board to carry out an unexpired term due to Mr. Charlie

Robinson's death as trustee in February of '64 to June of '64, which I was elected then as vice president of the local union.

Q All right. How long or how many terms—let me put it that way, did you serve as vice president of Local 1466?

A Three terms.

Q During the time that you were vice president, did you hold another office concurrently with the vice presidency?

[3503] A I held chairman of the grievance committee, and also carried out an unexpired term of the late president, Perry L. Thompson.

Q Now Mr. Thompson died, I believe, in 1972?

A Right.

Q Would that be correct?

A Right.

Q And so you served as president from the time of his death until when?

A Well, from the time that he retired I had taken over as of the first of April, '72.

Q All right. And you served then until the next—

A Until the election of '73.

* * * *

[3510] MISS PRIVETT: No objection.

MR. CLEMON: No objection.

THE COURT: It's received.

Q Mr. Hammonds, after that award was handed down by Mr. McCoy and after black employees started to move into the riveter jobs, was that award given some sort of plantwide application, that is, to other departments to let helpers and other people who had not bid on the higher rated jobs move up?

A Well, I will say it was a ground breaker for the entire plant.

Q Well, would it be fair to say, Mr. Hammonds, that it is that grievance that put Mr. Wormley in the

position at least of being able to try out and be a riveter at the time he was telling us about when he testified?

A It would be.

Q Now, Mr. Hammonds, let me move considerably forward in time from 1964 until 1972, and ask you about a grievance that arose then. Was there a time when the union had a grievance pending and the company made a proposal to merge several departments as a means of settling that grievance?

[3511] A Yeah. They did have—settle a grievance.

Q Tell the Court if you would, please, sir, just what that grievance was about.

A As I recall the plant went down in '72.

Q Was that—

A Due to a layoff.

Q That has been referred to several times here.

A Sure. And they had to change over to the machine shop at this time, and they laid everybody off except for a few employees. During the time that the plant was down there was two automatic saws that was installed in the forge department. And they were moved from the forge department to the punch and shear department. On our return back to work, we protested the moving of the saws, either asked the men that were formerly operating in the forge shop would go down and operate them in the punch and shear area.

Q And take their seniority with them?

A That's right. Well, the company said they had a right to move the machines, and it was a dispute about the men being moved. So the company [3512] came up with a proposal that they would move the men out of the wheel and axel forge shop and I believe it was the hook-ons in the truck shop, steel miscellaneous, all merge into and wherever seniority list falls it would be inserted between the individuals in that department. So bringing that proposal to the committees, we discussed very lengthy

in a meeting there, and I notified with the notice in the plant to be at the union meeting the next meeting. And as explained to some of them in the plant, what the meeting was about and of course they passed the word around. At our arrival at the union meeting, 4:00 Tuesday, in the afternoon, we proposed to the members—

Q Let me interrupt you right there and ask you whether or not the size of the crowd at the meeting, was it larger than usual, smaller than usual or what was the size of the attendance at that particular meeting?

A It was a packed house, I would say. Majority of them were black.

Q That was my next question.

Do you have any recollection about whether [3513] there were more blacks present than whites?

A There were more blacks present than whites.

Q Tell the Court, if you will, what happened then? You were beginning to say that the officers I guess or did you do it personally yourself made the presentation to the local?

A I made the presentation to the local myself.

Q You did that yourself?

A Right.

Q Did you explain what the company had proposed, that is, to dovetail the seniority from all those departments?

A We did.

Q All right. Was there a decision made by the entire membership present as to the company's proposal to dovetail seniority in those departments?

A Well, time would allow for all members that were present to have a chance to ask questions and speak their opinion. And after doing that, each committee got up and explained the part that they wanted to help explain. Then a motion was carried allowing them to vote on whatever way they [3514] wanted to be. The democratic organization motion was made, seconded by

another member, and carried, and it was voted unanimous to turn the proposal from the company down because they didn't want the merger in there.

Q In other words, the decision was unanimous?

A Right.

Q And the decision was to reject the proposal to merge the department in slot seniorities?

A Right.

Q After that time and after that meeting, Mr. Hammonds, I take it that really is the last time that that question has come up at least in that large a context?

A That is the only time.

* * * *

[3534] Q You testified at one time there was a vote down there on merging. Do I understand it right that the vote was to merge or dovetail the seniority in some five departments?

A It was.

Q Or did it just include crane jobs in those departments or was it everything in those five departments?

A That was where the men were going—operating machines. Since we were grieving about the saw job, which was a machine, then the company proposed to the union to merge the forge shop, the wheel and axel department, along with the hook-on and cranemans and steel miscellaneous departments and place their seniority wherever allotted in those departments. That is what the vote was about.

Q Wasn't it to—was it to put this punch [3535] and shear department and press department in there too or just the cranemen or what?

A Well, it was all combined.

Q All to be combined?

A Now punch and shear, press and miscellaneous, forge and wheel and axel were proposed to be merged with those other three named.

* * * *

[3535] Q * * * And I'd better ask you this, was there any kind of advance notice to the members that that would be voted on, and you say there was a big crowd?

A Sure. Wasn't a written notice, but it was a notice what we put up saying everybody be at the union meeting at 4:00 Tuesday, such and such a date.

* * * *

[3536] Q Were any opinions expressed in that meeting for or against a merger of departments?

A There was only one individual that I can recall, and he is dead now, that spoke in favor of moving it over, because if he come over there in that department, he would get a chance to work a little bit longer than the rest of—than he had been. But that was only one man.

Q Was he black or white?

A He was white.

* * * *

Q In other words, one white man spoke out for it because—and you feel that he had something to gain personally by a merger?

A Right.

* * * *

[3537] Q And did other people speak out in opposition to the proposal?

A Well, about—out of about five hundred and something members, I would say that were present at that particular meeting, we will say about twenty of them spoke their opinion about it which was against them.

Q What was the basis that—of their understanding why, why were they against it?

A Because they didn't want a man to come in and be slotted over them, and cut off, and they would have a chance to be cut off where they haven't been. In other words, they were being moved out of some line of promo-

tion where it would—so they would remain in the seniority bracket as it is now.

Q In other words, they indicated that they had some interest in maintaining that seniority system the way it was?

A Right.

* * * *

[3609] Q Now, Mr. Hammonds, did y'all explore with [3610] the company various proposals, different ways to merge departments at that time or was it all just based on one proposal?

A No. As I recall we set down and discussed it several times, and we drawed up two different types of operations there we thought might have worked, and after looking into it, it wasn't satisfactory enough, so we discarded. And then we finally came up with the assistance of the international and local union with this proposal here, the company did. So we had taken it before the rank and file.

Q So you say when you're working out some preliminary proposals, you were considering what would be feasible in an operation, didn't you?

A Sure. I was looking at the long time service employees in that department, and I also was looking at the advantage and disadvantage in it.

Q But I mean in making a proposal that made any sense, you didn't go and look say at—talk about confining—let me think of a good example. The paint shipping track department say with the power house department, that would have no—make [3611] no sense much, would it?

A It wouldn't have any connection as far as the operation comparison.

Q People wouldn't know a thing about the other operation, would they?

A That's right.

Q So you were really considering things that would be operationally feasible that you did have enough relation that people could be reasonably be expected to qualify on any other jobs and all that, isn't that what you were after at that time?

A In other words, to make it more understandable were that if a man was a press operator or any kind of machine operator in the forge shop, then he goes to the press department, he would still have knowledge of operating the machine. Now you couldn't handle—we thought we couldn't handle it, take a man out of the press department and send him to the electric department when he never has had any knowledge of electricity.

Q Certain kinds of mergers of seniorities you mentioned just make no sense as far as building cars?

[3612] A Right.

Q That is obvious, isn't it, Mr. Hammonds?

A That's right.

Q You know that the company—do you know whether or not the company has proposed other types of modifications in the seniority system such as combining all the transportation functions, that is, the rail, you know the rail, what they call the railroad department, all the cranes in the place, the forklift trucks and steel miscellaneous, storage in the steelyard, do you know that has been proposed in the collective bargaining?

A Well, under the forklift operators where they were in the transportation department which would come under—they were steel storage. So they tried to combine them all in the transportation department which would come under the head of crane operator hook-on and all that.

Q You know that that has been a proposal that has been made?

A That's right.

Q And one operational advantage you can have the same crane operator go from one end to the other [3613] which they don't do now, is that right?

A That's right.

Q All that has been discussed, hasn't it?

A While I was in there, it has.

Q Let me ask you if the union and the union membership hasn't uniformly opposed this for the same reason they are opposing any such merger?

A We have uniform proposals to them, and also we have rejected some of the proposals that they brought up.

Q It has been proposed and talked about different kinds of mergers, but somebody is always going to get hurt, and they—the membership won't go along with it, that is true, isn't it, Mr. Hammonds?

A Well, you can't help everybody and you can't hurt everybody.

Q That's right. And let me ask you, Mr. Hammonds, if you go to tinkering with that from the operational standpoint, you have got to view whether it makes sense to help you build cars, don't you?

A All that has to be taken into consideration.

Q From the employees' standpoint, you have got to figure out what affect it is going to have on the [3614] employees, don't you?

A Right.

Q And both of those are very important in that, aren't they?

A Sure.

Q And let me ask you this, those things, when they come up, they have been the subject of serious discussions and as far as you are concerned good faith efforts by both union and the company to work something out?

A Yeah. Anything that we thought was—would cause any trouble legally, what I mean from—we may have to face the EEOC or the office of compliance department

as far as the union is concerned, and we would contact the international along with the international lawyer representative of the firm to see the best way to go.

* * * *

[3616] Q How many times has the question of a merger of departments been put to the full membership of the union per vote?

A What do you mean? By entire program?

Q That's right.

A We have had it come up ourselves I would say about three times.

Q And have the votes on these mergers been unanimous?

A The one that we did have, sure.

Q There have been no opposition votes whatsoever?

A No one voted against.

* * * *

[3840] RALPH JONES,

being first duly sworn, testified as follows:

* * * *

Q Where do you work?

A Pullman-Standard.

Q When did you come to work there?

A 1945.

* * * *

[3850] Q Was there an occasion, Mr. Jones, when you discussed the possibility of your transfer to another department?

A Yes.

Q What department was it?

A To the maintenance department.

Q How did that discussion come about?

A I was asked by Mr. Debrow would I consider being a millwright, and I told him I would. And later on I was called down to the office, and Mr. Crotwell told me

that the two presidents [3851] wouldn't agree for me to interchange unions. And I in turn went back and talked to Mr. Miles about it. And he said he didn't know anything about it. He didn't even know that I was being considered for millwright. So then I was called back down again and asked to be a mechanic. I had prior schooling as a mechanic. And Mr. Crotwell, after he—after the conversation was over, he told me, he said, well, Ralph, I'm sorry, but they just won't let you interchange unions, but if you find me a good nigger that is mechanical minded and can learn, you write him a note, and I will hire him.

* * * *

[3853] Q Let me ask you if Mr. Crotwell said anything to you when you were discussing going to be a millwright to the effect that you—about what your sennority status would be if you did go over there?

A He told me, said you could work over there two years, and I understood that part that is in the contract and all of that was well and good with me, and after I indicated that I didn't mind that, then he told me that the president wouldn't allow me to interchange local unions.

Q That is all he told you was he just would not allow you to change unions?

A That is what he told me, that the two presidents had agreed upon.

Q And he didn't say anything about seniority in connection with changing union membership or [3854] anything like that?

A Oh, yeah. He told me that I would be the youngest man in the department on the seniority list. Well, I understood that in the beginning.

* * * *

[3861] Q Now, you told Mr. Clemon about your attempt [3862] to get a millwright job and your conver-

sation with Mr. Crotwell, Mr. Jones. As I understand your testimony, Mr. Crotwell tried to put it on the two local unions as the reason to tell you why you couldn't get that job by telling you that the local presidents would not let you switch unions?

A That's right.

Q Do you know whether or not as a matter of fact the company has anything to do with whether or not an employee belongs to one union or another?

A No, I don't.

Q In fact, Mr. Minor indicated to you that it really wasn't any of the company's business who belonged to what union, didn't he?

A No. He said he didn't know, even know anything about it.

Q He just said that he—did he tell you that he had not told Crotwell that you couldn't switch unions and he didn't know you were interested in the job?

A That's right.

Q Did you ever talk to Mr. Ed Davidson then, who was the IAM local president?

[3863] A No, I didn't.

* * * *

[4045] THE COURT:

Also, I think it would be of some value if the Court indicated of record what appear to be the races or colors of the various witnesses who have testified. Sometimes that is brought [4046] out in examination and sometimes it is not. If counsel would follow with me on my notations as I read them into the record, and if there is any questions about it, you can correct my notation. These, I believe, are in the order in which they have testified: J. R. Hudson, white; Henry Thompson, black; Alvester Braxton, black; Sam Maxwell, black; Matthew Hunter, black; Spurgeon Seals, black; Kie Bates, black; Edward Lofton, black; Richard Davis, black; Hugh Wilson, black; Edgar Davis, black; Harvest Morgan, black; Samuel

Thomas, black; John Hampton, black; Jessie Heard, black; L. D. Holmes, black; Albert Johnson, black; Junior Wormley, black; Leonard Lewis, black; Katrina Mitchell, black; Fred Baltimore, black; Tommy Williams, black; Willie James Johnson, black; Clyde Humphrey, black; Louis Swint, black; Louis Pinkard, black; Donald Frederick, white; Franklin Snyder, white; Clyde Robertson, white; Harry Debrow, black; Henry Vann, black; John London, black; Dick Snyder, white; Thomas Blazer, white; Miles Ward, black; Walter Whitehurst, white; Paul Walker, black; James Moss, white; F. R. Rodriguez, white or [4047] Spanish surnamed; Austin Cain, white; Alfred Moorer, black; Bill Eddings, white; William Poe, white; Colin Clemons, white; Leullen LeShoure, black; Harry Crane, white; Fred Cottrell, black; William J. Harris, white; George Johnston, white; Fred Prince, black; Fount Hammock, white; Fred Hull, white; Ross Hammonds, black; Albert Wolff, white; Gerald McCarroll, black; Willie Lewis, black; Ralph Jones, black; Theodore Sparks, black; Willie Thomas, black; Samuel Thomas, black; Walter Hinton, black; Eugene McGee, black; Robert Northfleet, black; Bobby Arnold, black; A. C. Cole, black; Virgil Northfleet, black; George Washington, black; William C. Harris, black; L. D. Holmes, black; and according to my records this covers each of the witnesses.

• • • •

EXHIBITS INTRODUCED AT 1974 TRIAL

PLAINTIFFS' EXHIBIT 55

COMPARATIVE JOB CLASSES OF PULLMAN-STANDARD PRODUCTION AND MAINTENANCE EMPLOYEES WITH MORE THAN SIX YEARS OF SENIORITY AS OF JUNE, 1973

Job Class	Non-Incentive Hourly Wage Rate As of 10/1/73	Whites	Blacks	Total
1	$3.635	0	6	6
2	3.635	0	4	4
3	3.733	1	0	1
4	3.831	10	63	73
5	3.929	3	45	48
6	4.027	67	302	369
7	4.125	6	50	56
8	4.223	31	82	113
9	4.321	25	43	68
10	4.419	450	57	507
11	4.517	29	68	97
12	4.615	29	14	43
13	4.713	30	2	32
14	4.811	0	1	1
15	4.909	27	2	29
16	5.007	15	3	18
17	5.105	1	0	1
18	5.203	23	1	24
20	5.399	6	0	6
		753	743	1497

% of Black employees earning less than $4.25 hourly (Job Class 8 or below):	74.1%
% of White employees earning more than $4.40 hourly (Job Class 10 or above):	80.7%
% of Black employees earning more than $4.40 hourly (Job Class 10 or above):	19.9%
% of White employees earning less than $4.25 hourly (Job Class 8 or below):	15.8%

COMPANY EX. 309

PULLMAN-STANDARD—BESSEMER;
SWINT AND JOHNSON VS. PULLMAN-STANDARD

RACIAL STATISTICS ON P&M STEELWORKERS UNION OFFICERS, COMMITTEEMEN AND STEWARDS FROM 1965 TO DATE

BESSEMER—April 4, 1973

CONFIDENTIAL

MR. F. B. SNYDER:

In accordance with your memorandum of February 14, 1973, I am sending the attached information concerning the above subject.

This report shows that there was a majority of Negro Union Department Shop Stewards during the period of time involved. In addition, Mr. J. Mautman Herring, who was President of the local Steelworkers Union for approximately 22 years and a Union Committeeman for approximately 30 years, has stated that there were more Negro Union Shop Stewards during the many years he served in an official capacity for the Steelworkers Union.

The report also shows that the office of President, Chairman of the Grievance Committee, Acting President, Vice President, Financial Secretary and Grievance Committeeman has been held by a Negro.

/s/ J. R. Hudson
J. R. HUDSON

BESSEMER—March 12, 1973

Mr. J. Mautman Herring, Badge No. 2633, who was President of Local Union No. 1466 (Steelworkers) for approximately 22 years, and a Union Committeeman for approximately 30 years, made the statement that during that period of time, there were more Negro Union Shop Stewards than Caucasian Union Shop Stewards.

/s/ J. R. Hudson

1965		
Officers	Caucasian	Negro
5	3	2
Shop Stewards	Caucasian	Negro
28	13	15
1966		
Officers	Caucasian	Negro
5	3	2
Shop Stewards	Caucasian	Negro
28	13	15
Through June, 1967		
Officers	Caucasian	Negro
5	3	2
Shop Stewards	Caucasian	Negro
28	13	15
From July, 1967		
Officers	Caucasian	Negro
5	3	2
Shop Stewards	Caucasian	Negro
32	9	23
1968		
Officers	Caucasian	Negro
5	3	2
Shop Stewards	Caucasian	Negro
32	9	23
1969		
Officers	Caucasian	Negro
5	3	2
Shop Stewards	Caucasian	Negro
32	9	23
Through June, 1970		
Officers	Caucasian	Negro
5	3	2
Shop Stewards	Caucasian	Negro
32	9	23

From July, 1970		
Officers	Caucasian	Negro
6	3	3
Shop Stewards	Caucasian	Negro
33	10	23
1971		
Officers	Caucasian	Negro
6	3	3
Shop Stewards	Caucasian	Negro
39	13	26
Through February, 1972		
Officers	Caucasian	Negro
6	3	3
Shop Stewards	Caucasian	Negro
39	13	26
From March, 1972		
Officers	Caucasian	Negro
6	3	3
Shop Stewards	Caucasian	Negro
39	13	26
1973		
Officers	Caucasian	Negro
6	3	3
Shop Stewards	Caucasian	Negro
40	14	26

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS—1965

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE		
Badge No. 2633	Mautman J. Herring	C
VICE PRESIDENT		
Badge No. 982	Ross Hammonds	N
FINANCIAL SECRETARY		
Badge No. 963	Gus Dickerson	N
TREASURER		
Badge No. 2651	Earl Walls	C
RECORDING SECRETARY		
Badge No. 2306	John H. Porter, Jr.	C

SHOP STEWARDS—1965

WELDING DEPARTMENT		
Badge No. 2853	Wilburn L. Lanier	C
Badge No. 2734	Jack Posey	C
Badge No. 1654	Henry Vann, Jr.	N
Badge No. 1655	Neal Bell	N
Badge No. 2641	Robert C. Grimes	C
Badge No. 1637	Robert Mosely	N
Badge No. 1643	Gus Levins	N
Badge No. 2872	Felton H. White	C
STEEL CONSTRUCTION DEPARTMENT		
Badge No. 692	O. J. Gilbert	N
STEEL ERECTION DEPARTMENT		
Badge No. 1022	Willie Key	N
MAINTENANCE DEPARTMENT		
Badge No. 3347	Leon Bridges	C
Badge No. 3350	Milton Baughn	C
Badge No. 3358	James C. Blackmon	C
PUNCH, SHEAR AND PRESS DEPARTMENTS		
Badge No. 849	Sam West	N
Badge No. 2483	Glenn Acker	C
Badge No. 508	William Jordan	N
STEEL MISCELLANEOUS DEPARTMENT		
Badge No. 1867	Manuel Cleveland	N
Badge No. 1859	William F. Wilkes	N

TRUCK DEPARTMENT		
Badge No. 771	Lister Walton	N
MISCELLANEOUS STORES		
Badge No. 1814	Simmie Robinson	N
STEEL STORES DEPARTMENT		
Badge No. 1353	Cleotha Wilson	N
PAINT & SHIPPING TRACK DEPARTMENT		
Badge No. 4596	James B. Harmon	C
Badge No. 426	Willie Carter	N
Badge No. 4547	Leroy Carr	C
WOOD ERECTION DEPARTMENT		
Badge No. 346	Nathanial Pope	N
WOOD MILL DEPARTMENT		
Badge No. 2568	Wilmer T. Aldridge	C
PLANT PROTECTION DEPARTMENT		
Badge No. 3614	Clayton W. Wright	C
POWER HOUSE DEPARTMENT		
Badge No. 3301	Gerald Beggs	C

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS—1966

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE		
Badge No. 2633	Mautman J. Herring	C
VICE PRESIDENT		
Badge No. 982	Ross Hammonds	N
FINANCIAL SECRETARY		
Badge No. 963	Gus Dickerson	N
TREASURER		
Badge No. 2651	Earl Walls	C
RECORDING SECRETARY		
Badge No. 2306	John H. Porter, Jr.	C

SHOP STEWARDS—1966

STEEL MISCELLANEOUS DEPARTMENT		
Badge No. 1867	Manuel Cleveland	N
Badge No. 1839	William F. Wilkes	N
TRUCK DEPARTMENT		
Badge No. 771	Lister Walton	N
MISCELLANEOUS STORES		
Badge No. 1814	Simmie Robinson	N
STEEL STORES DEPARTMENT		
Badge No. 1353	Cleotha Wilson	N
PAINT & SHIPPING TRACK DEPARTMENT		
Badge No. 4596	James B. Harmon	C
Badge No. 426	Willie Carter	N
Badge No. 4547	Leroy Carr	C
WOOD ERECTION DEPARTMENT		
Badge No. 346	Nathanial Pope	N
WOOD MILL DEPARTMENT		
Badge No. 2568	Wilmer T. Aldridge	C
PLANT PROTECTION DEPARTMENT		
Badge No. 3614	Clayton W. Wright	C
POWER HOUSE DEPARTMENT		
Badge No. 3301	Gerald Beggs	C
WELDING DEPARTMENT		
Badge No. 2853	Wilburn L. Lanier	C
Badge No. 2734	Jack Posey	C
Badge No. 1654	Henry Vann, Jr.	N
Badge No. 1655	Neal Bell	N
Badge No. 2641	Robert C. Grimes	C
Badge No. 1637	Robert Mosley	N
Badge No. 1643	Gus Levins	N
Badge No. 2872	Felton H. White	C
STEEL CONSTRUCTION DEPARTMENT		
Badge No. 692	O. J. Gilbert	N
STEEL ERECTION DEPARTMENT		
Badge No. 1022	Willie Key	N
MAINTENANCE DEPARTMENT		
Badge No. 3347	Leon Bridges	C
Badge No. 3350	Milton Baughn	C
Badge No. 3358	James C. Blackmon	C

PUNCH, SHEAR AND PRESS DEPARTMENTS

Badge No. 849	Sam West	N
Badge No. 2483	Glenn Acker	C
Badge No. 508	William Jordan	N

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS THROUGH JUNE, 1967

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE

Badge No. 2633	Mautman J. Herring	C

VICE PRESIDENT

Badge No. 982	Ross Hammonds	N

FINANCIAL SECRETARY

Badge No. 963	Gus Dickerson	N

TREASURER

Badge No. 2651	Earl Walls	C

RECORDING SECRETARY

Badge No. 2306	John H. Porter, Jr.	C

SHOP STEWARDS THROUGH JUNE, 1967

WELDING DEPARTMENT

Badge No. 2853	Wilburn L. Lanier	C
Badge No. 2734	Jack Posey	C
Badge No. 1654	Henry Vann, Jr.	N
Badge No. 1655	Neal Bell	N
Badge No. 2641	Robert C. Grimes	C
Badge No. 1637	Robert Mosley	N
Badge No. 1643	Gus Levins	N
Badge No. 2872	Felton H. White	C

STEEL CONSTRUCTION DEPARTMENT

Badge No. 692	O. J. Gilbert	N

STEEL ERECTION DEPARTMENT

Badge No. 1022	Willie Key	N

MAINTENANCE DEPARTMENT

Badge No. 3347	Leon Bridges	C
Badge No. 3350	Milton Baughn	C
Badge No. 3358	James C. Blackmon	C

PUNCH, SHEAR AND PRESS DEPARTMENTS

Badge No. 849	Sam West	N
Badge No. 2483	Glenn Acker	C
Badge No. 508	William Jordan	N

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1867	Manuel Cleveland	N
Badge No. 1839	William F. Wilkes	N

TRUCK DEPARTMENT

Badge No. 771	Lister Walton	N

MISCELLANEOUS STORES

Badge No. 1814	Simmie Robinson	N

STEEL STORES DEPARTMENT

Badge No. 1353	Cleotha Wilson	N

PAINT & SHIPPING TRACK DEPARTMENT

Badge No. 4596	James B. Harmon	C
Badge No. 426	Willie Carter	N
Badge No. 4547	Leroy Carr	C

WOOD ERECTION DEPARTMENT

Badge No. 346	Nathanial Pope	N

WOOD MILL DEPARTMENT

Badge No. 2568	Wilmer T. Aldridge	C

PLANT PROTECTION DEPARTMENT

Badge No. 3614	Clayton W. Wright	C

POWER HOUSE DEPARTMENT

Badge No. 3301	Gerald Beggs	C

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS FROM JULY, 1967

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE

Badge No. 3326	Milton M. Minor	C

VICE PRESIDENT

Badge No. 982	Ross Hammonds	N

FINANCIAL SECRETARY

Badge No. 1773	Eugene McGee	N

TREASURER

Badge No. 3331	Henry L. Taylor	C

RECORDING SECRETARY

Badge No. 2010	C. E. Kimbrel	C

SHOP STEWARDS FROM JULY, 1967

WELDING DEPARTMENT

Badge No. 2872	Felton White	C
Badge No. 2703	Horace Logan	C
Badge No. 1676	Joe Gray	N
Badge No. 1619	Fayette Dudley	N
Badge No. 2970	R. L. Benton	C

STEEL CONSTRUCTION DEPARTMENT

Badge No. 651	Elijah Knox	N
Badge No. 1811	Calvin Glover	N

MAINTENANCE DEPARTMENT

Badge No. 3325	W. B. Hartley	C
Badge No. 3474	W. J. Scott	C

PUNCH, SHEAR AND PRESS DEPARTMENTS

Balge No. 563	Willie Simmons	N
Badge No. 530	William Jones	N
Badge No. 508	Willie Jordan	N
Badge No. 2483	Glen Acker	C
Badge No. 2541	J. P. Williams	C
Badge No. 1102	Henry Clayton	N
Badge No. 503	Joe Carlton	N

STEEL ERECTION DEPARTMENT

Badge No. 1024	Horace Perry	N
Badge No. 1103	Ralph Jones	N

WHEEL AND AXLE DEPARTMENT

Badge No. 2172	Jack Rogers	C
Badge No. 1266	William Winder	N
Badge No. 2178	Ed Beck	C

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1867	Manual Cleveland	N
Badge No. 1376	Cleo E. Campbell	N
Badge No. 948	Robert L. Williams	N
Badge No. 307	Craig Paulding	N

WOOD ERECTION DEPARTMENT

Badge No. 346	Nathanial Pope	N

PAINT DEPARTMENT

Badge No. 486	Henry Moore	N
Badge No. 484	Willie Johnson	N
Badge No. 436	Herman Torrence	N

STEEL STORES DEPARTMENT

Badge No. 923	Theadore Miller	N
Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	Thomas L. Ratcliff	N

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS—1968

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE

Badge No. 3326	Milton M. Minor	C

VICE PRESIDENT

Badge No. 982	Ross Hammonds	N

FINANCIAL SECRETARY

Badge No. 1773	Eugene McGee	N

TREASURER

Badge No. 3331	Henry L. Taylor	C

RECORDING SECRETARY

Badge No. 2010	C. E. Kimbrel	C

SHOP STEWARDS—1968

WELDING DEPARTMENT

Badge No. 2872	Felton White	C
Badge No. 2703	Horace Logan	C
Badge No. 1676	Joe Gray	N
Badge No. 1619	Fayette Dudley	N
Badge No. 2970	R. L. Benton	C

STEEL CONSTRUCTION DEPARTMENT

Badge No. 651	Elijah Knox	N
Badge No. 1811	Calvin Glover	N

MAINTENANCE DEPARTMENT

Badge No. 3325	W. B. Hartley	C
Badge No. 3474	W. J. Scott	C

PUNCH, SHEAR AND PRESS DEPARTMENTS

Badge No. 563	Willie Simmons	N
Badge No. 530	William Jones	N
Badge No. 508	Willie Jordan	N
Badge No. 2483	Glen Acker	C
Badge No. 2541	J. P. Williams	C
Badge No. 1102	Henry Clayton	N
Badge No. 503	Joe Carlton	N

STEEL ERECTION DEPARTMENT

Badge No. 1024	Horace Perry	N
Badge No. 1103	Ralph Jones	N

WHEEL AND AXLE DEPARTMENT

Badge No. 2172	Jack Rogers	C
Badge No. 1266	William Winder	N
Badge No. 2178	Ed Beck	C

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1867	Manual Cleveland	N
Badge No. 1376	Cleo E. Campbell	N
Badge No. 948	Robert L. Williams	N
Badge No. 307	Craig Paulding	N

WOOD ERECTION DEPARTMENT

Badge No. 346	Nathanial Pope	N

PAINT DEPARTMENT

Badge No. 486	Henry Moore	N
Badge No. 484	Willie Johnson	N
Badge No. 436	Herman Torrence	N

STEEL STORES DEPARTMENT

Badge No. 923	Theadore Miller	N
Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	Thomas L. Ratcliff	N

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS—1969

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE		
Badge No. 3326	Milton M. Minor	C
VICE PRESIDENT		
Badge No. 982	Ross Hammonds	N
FINANCIAL SECRETARY		
Badge No. 1773	Eugene McGee	N
TREASURER		
Badge No. 3331	Henry L. Taylor	C
RECORDING SECRETARY		
Badge No. 2010	C. E. Kimbrel	C

SHOP STEWARDS—1969

WELDING DEPARTMENT		
Badge No. 2872	Felton White	C
Badge No. 2703	Horace Logan	C
Badge No. 1676	Joe Gray	N
Badge No. 1619	Fayette Dudley	N
Badge No. 2970	R. L. Benton	C
STEEL CONSTRUCTION DEPARTMENT		
Badge No. 651	Elijah Knox	N
Badge No. 1811	Calvin Glover	N
MAINTENANCE DEPARTMENT		
Badge No. 3326	W. B. Hartley	C
Badge No. 3474	W. J. Scott	C
PUNCH, SHEAR AND PRESS DEPARTMENTS		
Badge No. 563	Willie Simmons	N
Badge No. 530	William Jones	N
Badge No. 508	Willie Jordan	N
Badge No. 2483	Glen Acker	C
Badge No. 2541	J. P. Williams	C
Badge No. 1102	Henry Clayton	N
Badge No. 503	Joe Carlton	N
STEEL ERECTION DEPARTMENT		
Badge No. 1024	Horace Perry	N
Badge No. 1103	Ralph Jones	N

WHEEL AND AXLE DEPARTMENT

Badge No. 2172	Jack Rogers	C
Badge No. 1266	William Winder	N
Badge No. 2178	Ed Beck	C

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1867	Manual Cleveland	N
Badge No. 1376	Cleo E. Campbell	N
Badge No. 948	Robert L. Williams	N
Badge No. 307	Craig Paulding	N

WOOD ERECTION DEPARTMENT

Badge No. 346	Nathanial Pope	N

PAINT DEPARTMENT

Badge No. 486	Henry Moore	N
Badge No. 484	Willie Johnson	N
Badge No. 436	Herman Torrence	N

STEEL STORES DEPARTMENT

Badge No. 923	Theadore Miller	N
Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	Thomas L. Ratcliff	N

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS THROUGH JUNE, 1970

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE

Badge No. 3326	Milton M. Minor	C

VICE PRESIDENT

Badge No. 982	Ross Hammonds	N

FINANCIAL SECRETARY

Badge No. 1773	Eugene McGee	N

TREASURER

Badge No. 3331	Henry L. Taylor	C

RECORDING SECRETARY

Badge No. 2010	C. E. Kimbrel	C

SHOP STEWARDS THROUGH JUNE, 1970

WELDING DEPARTMENT		
Badge No. 2872	Felton White	C
Badge No. 2703	Horace Logan	C
Badge No. 1676	Joe Gray	N
Badge No. 1619	Fayette Dudley	N
Badge No. 2970	R. L. Benton	C
STEEL CONSTRUCTION DEPARTMENT		
Badge No. 651	Elijah Knox	N
Badge No. 1811	Calvin Glover	N
MAINTENANCE DEPARTMENT		
Badge No. 3326	W. B. Hartley	C
Badge No. 3474	W. J. Scott	C
PUNCH, SHEAR AND PRESS DEPARTMENTS		
Badge No. 563	Willie Simmons	N
Badge No. 530	William Jones	N
Badge No. 508	Willie Jordan	N
Badge No. 2483	Glen Acker	C
Badge No. 2541	J. P. Williams	C
Badge No. 1102	Henry Clayton	N
Badge No. 503	Joe Carlton	N
STEEL ERECTION DEPARTMENT		
Badge No. 1024	Horace Perry	N
Badge No. 1103	Ralph Jones	N
WHEEL AND AXLE DEPARTMENT		
Badge No. 2172	Jack Rogers	C
Badge No. 1266	William Winder	N
Badge No. 2178	Ed Beck	C
STEEL MISCELLANEOUS DEPARTMENT		
Badge No. 1867	Manual Cleveland	N
Badge No. 1376	Cleo E. Campbell	N
Badge No. 948	Robert L. Williams	N
Badge No. 307	Craig Paulding	N
WOOD ERECTION DEPARTMENT		
Badge No. 346	Nathanial Pope	N
PAINT DEPARTMENT		
Badge No. 486	Henry Moore	N
Badge No. 484	Willie Johnson	N
Badge No. 436	Herman Torrence	N

STEEL STORES DEPARTMENT

Badge No. 923	Theadore Miller	N
Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	Thomas L. Ratcliff	N

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS FROM JULY, 1970

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE

Badge No. 1603	Perry L. Thompson	N

VICE PRESIDENT

Badge No. 982	Ross Hammonds	N

FINANCIAL SECRETARY

Badge No. 1022	Willie Key	N

RECORDING SECRETARY

Badge No. 2010	Chesley E. Kimbrel	C

TREASURER

Badge No. 3331	Henry L. Taylor	C

COMMITTEEMAN

Badge No. 298	William T. Adkins	C

SHOP STEWARDS FROM JULY, 1970

WELDING DEPARTMENT

Badge No. 1655	Neal Bell	N
Badge No. 1621	Dennis McGruder	N
Badge No. 2851	J. C. Kennedy	C
Badge No. 4946	H. M. Thomas	C
Badge No. 1027	Fred Hampton	N

STEEL ERECTION DEPARTMENT

Badge No. 1022	Willie Key	N
Badge No. 1024	Horace Perry	N
Badge No. 1005	Louis Pinkard	N

STEEL CONSTRUCTION DEPARTMENT

Badge No. 545	Samuel Harris	N
Badge No. 651	Elijah Knox	N

MAINTENANCE DEPARTMENT		
Badge No. 1773	Eugene McGee	N
Badge No. 3377	Billy Joe Pickens	C
PUNCH, SHEAR AND PRESS DEPARTMENTS		
Badge No. 2483	Glenn Acker	C
Badge No. 580	Robert Murry	N
Badge No. 563	William Simmons	N
Badge No. 555	Robert Sanders	N
Badge No. 1102	Henry Clayton	N
WHEEL & AXLE DEPARTMENT		
Badge No. 2172	Jack Rodgers	C
FORGE DEPARTMENT		
Badge No. 4585	Jerald Hammonds	C
Badge No. 1305	Matthew Hunter	N
STEEL MISCELLANEOUS DEPARTMENT		
Badge No. 1364	James Taylor	N
Badge No. 1868	O. J. Herndon	N
WOOD ERECTION DEPARTMENT		
Badge No. 306	Edward Dancy	N
PAINT & SHIPPING TRACK DEPARTMENT		
Badge No. 486	Henry Moore	N
Badge No. 4550	Orville Canoles	C
Badge No. 484	Willie Johnson	N
STEEL STORES DEPARTMENT		
Badge No. 1162	Donald Foreman	N
TRUCK DEPARTMENT		
Badge No. 770	T. L. Ratcliff	N
MISCELLANEOUS STORES		
Badge No. 1814	Simmie Roberson	N
PLANT PROTECTION & JANITORS DEPARTMENTS		
Badge No. 1689	Willie Thomas	N
Badge No. 3614	Clayton Wright	C
INSPECTION DEPARTMENT		
Badge No. 4970	William C. Boyd	C
Badge No. 2958	Henry Hogg	C

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS—1971

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE

Badge No. 1603	Perry L. Thompson	N

VICE PRESIDENT

Badge No. 982	Ross Hammonds	N

FINANCIAL SECRETARY

Badge No. 1022	Willie Key	N

RECORDING SECRETARY

Badge No. 2010	Chesley E. Kimbrel	C

TREASURER

Badge No. 3331	Henry L. Taylor	C

COMMITTEEMAN

Badge No. 298	William T. Adkins	C

SHOP STEWARDS—1971

WELDING DEPARTMENT

Badge No. 1655	Neal Bell	N
Badge No. 1621	Dennis McGruder	N
Badge No. 2851	J. C. Kennedy	C
Badge No. 4946	H. M. Thomas	C
Badge No. 1027	Fred Hampton	N
Badge No. 3566	Earl Baldwin	C
Badge No. 4720	L. E. Walker	C
Badge No. 3530	Arval L. Hulsey	C

STEEL ERECTION DEPARTMENT

Badge No. 1022	Willie Key	N
Badge No. 1024	Horace Perry	N
Badge No. 1005	Louis Pinkard	N

STEEL CONSTRUCTION DEPARTMENT

Badge No. 545	Samuel Harris	N
Badge No. 651	Elijah Knox	N

MAINTENANCE DEPARTMENT

Badge No. 1773	Eugene McGee	N
Badge No. 3377	Billy Joe Pickens	C

PUNCH, SHEAR AND PRESS DEPARTMENT

Badge No. 2483	Glenn Acker	C
Badge No. 580	Robert Murry	N
Badge No. 565	William Simmons	N
Badge No. 555	Robert Sanders	N
Badge No. 1102	Henry Clayton	N

WHEEL & AXLE DEPARTMENT

Badge No. 2172	Jack Rodgers	C

FORGE DEPARTMENT

Badge No. 4585	Jerald Hammonds	C
Badge No. 1305	Matthew Hunter	N

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1364	James Taylor	N
Badge No. 1868	O. J. Herndon	N
Badge No. 318	Clarence S. Hearns	N
Badge No. 1832	Henry B. Moore	N

WOOD ERECTION DEPARTMENT

Badge No. 306	Edward Dancy	N

PAINT & SHIPPING TRACK DEPARTMENT

Badge No. 486	Henry Moore	N
Badge No. 4550	Orville Canoles	C
Badge No. 484	Willie Johnson	N

STEEL STORES DEPARTMENT

Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	T. L. Ratcliff	N

MISCELLANEOUS STORES

Badge No. 1814	Simmie Roberson	N

PLANT PROTECTION & JANITORS DEPARTMENTS

Badge No. 1689	Willie Thomas	N
Badge No. 3614	Clayton Wright	C

INSPECTION DEPARTMENT

Badge No. 4970	William C. Boyd	C
Badge No. 2958	Henry Hogg	C

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS THROUGH FEBRUARY, 1972

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE		
Badge No. 1603	Perry L. Thompson (Retired February, 1972)	N
VICE PRESIDENT		
Badge No. 982	Ross Hammonds	N
FINANCIAL SECRETARY		
Badge No. 1022	Willie Key	N
RECORDING SECRETARY		
Badge No. 2010	Chesley E. Kimbrel	C
TREASURER		
Badge No. 3331	Henry L. Taylor	C
COMMITTEEMAN		
Badge No. 298	William T. Adkins	C

SHOP STEWARDS THROUGH FEBRUARY, 1972

WELDING DEPARTMENT		
Badge No. 1655	Neal Bell	N
Badge No. 1621	Dennis McGruder (Deceased 10-24-72)	N
Badge No. 2851	J. C. Kennedy	C
Badge No. 4946	H. M. Thomas	C
Badge No. 1027	Fred Hampton	N
Badge No. 3566	Earl Baldwin	C
Badge No. 4720	L. E. Walker	C
Badge No. 3530	Arval L. Hulsey	C
STEEL ERECTION DEPARTMENT		
Badge No. 1022	Willie Key	N
Badge No. 1024	Horace Perry	N
Badge No. 1005	Louis Pinkard	N
STEEL CONSTRUCTION DEPARTMENT		
Badge No. 545	Samuel Harris	N
Badge No. 651	Elijah Knox	N
MAINTENANCE DEPARTMENT		
Badge No. 1773	Eugene McGee	N
Badge No. 3377	Billy Joe Pickens	C

PUNCH, SHEAR AND PRESS DEPARTMENTS

Badge No. 2483	Glenn Acker	C
Badge No. 580	Robert Murry	N
Badge No. 563	William Simmons	N
Badge No. 555	Robert Sanders	N
Badge No. 1102	Henry Clayton	N

WHEEL & AXLE DEPARTMENT

Badge No. 2172	Jack Rodgers	C

FORGE DEPARTMENT

Badge No. 4585	Jerald Hammonds	C
Badge No. 1305	Matthew Hunter	N

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1364	James Taylor	N
Badge No. 1868	O. J. Herndon	N
Badge No. 318	Clarence S. Hearns	N
Badge No. 1832	Henry B. Moore	N

WOOD ERECTION DEPARTMENT

Badge No. 306	Edward Dancy	N

PAINT & SHIPPING TRACK DEPARTMENT

Badge No. 486	Henry Moore	N
Badge No. 4550	Orville Canoles	C
Badge No. 484	Willie Johnson	N
Badge No. 472	Edward Lofton	N

STEEL STORES DEPARTMENT

Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	T. L. Ratcliff	N

MISCELLANEOUS STORES

Badge No. 1814	Simmie Roberson	N

PLANT PROTECTION & JANITORS DEPARTMENT

Badge No. 1689	Willie Thomas	N
Badge No. 3614	Clayton Wright	C

INSPECTION DEPARTMENT

Badge No. 4970	William C. Boyd	C
Badge No. 2958	Henry Hogg	C

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS FROM MARCH, 1972

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE		
Badge No. 982	Ross Hammonds	N
VICE PRESIDENT		
Badge No. 1162	Donald Foreman	N
FINANCIAL SECRETARY		
Badge No. 1022	Willie Key	N
RECORDING SECRETARY		
Badge No. 2010	Chesley E. Kimbrel	C
TREASURER		
Badge No. 3331	Henry L. Taylor	C
COMMITTEEMAN		
Badge No. 298	William T. Adkins	C

SHOP STEWARDS FROM MARCH, 1972

WELDING DEPARTMENT		
Badge No. 1655	Neal Bell	N
Badge No. 1621	Dennis McGruder (Deceased 10-24-72)	N
Badge No. 2851	J. C. Kennedy	C
Badge No. 4946	H. M. Thomas	C
Badge No. 1027	Fred Hampton	N
Badge No. 3566	Earl Baldwin	C
Badge No. 4720	L. E. Walker	C
Badge No. 3530	Arval L. Hulsey	C
STEEL ERECTION DEPARTMENT		
Badge No. 1022	Willie Key	N
Badge No. 1024	Horace Perry	N
Badge No. 1005	Louis Pinkard	N
STEEL CONSTRUCTION DEPARTMENT		
Badge No. 545	Samuel Harris	N
Badge No. 651	Elijah Knox	N
MAINTENANCE DEPARTMENT		
Badge No. 1773	Eugene McGee	N
Badge No. 3377	Billy Joe Pickens	C

PUNCH, SHEAR AND PRESS DEPARTMENTS

Badge No. 2483	Glenn Acker	C
Badge No. 580	Robert Murry	N
Badge No. 563	William Simmons	N
Badge No. 555	Robert Sanders	N
Badge No. 1102	Henry Clayton	N

WHEEL & AXLE DEPARTMENT

Badge No. 2172	Jack Rodgers	C

FORGE DEPARTMENT

Badge No. 4585	Jerald Hammonds	C
Badge No. 1305	Matthew Hunter	N

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1364	James Taylor	N
Badge No. 1868	O. J. Herndon	N
Badge No. 318	Clarence S. Hearns	N
Badge No. 1832	Henry B. Moore	N

WOOD ERECTION DEPARTMENT

Badge No. 306	Edward Dancy	N

PAINT & SHIPPING TRACK DEPARTMENT

Badge No. 486	Henry Moore	N
Badge No. 4550	Orville Canoles	C
Badge No. 484	Willie Johnson	N
Badge No. 472	Edward Lofton	N

STEEL STORES DEPARTMENT

Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	T. L. Ratcliff	N

MISCELLANEOUS STORES

Badge No. 1814	Simmie Roberson	N

PLANT PROTECTION & JANITORS DEPARTMENT

Badge No. 1689	Willie Thomas	N
Badge No. 3614	Clayton Wright	C

INSPECTION DEPARTMENT

Badge No. 4970	William C. Boyd	C
Badge No. 2958	Henry Hogg	C

UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE EMPLOYEES
LOCAL UNION NO. 1466

UNION OFFICERS THROUGH JUNE, 1973

PRESIDENT AND CHAIRMAN OF THE GRIEVANCE COMMITTEE		
Badge No. 982	Ross Hammonds	N
VICE PRESIDENT		
Badge No. 1162	Donald Foreman	N
FINANCIAL SECRETARY		
Badge No. 1022	Willie Key	N
RECORDING SECRETARY		
Badge No. 2010	Chesley E. Kimbrel	C
TREASURER		
Badge No. 3331	Henry L. Taylor	C
COMMITTEEMAN		
Badge No. 298	William T. Adkins	C

SHOP STEWARDS—1973

WELDING DEPARTMENT		
Badge No. 1655	Neal Bell	N
Badge No. 2851	J. C. Kennedy	C
Badge No. 4946	H. M. Thomas	C
Badge No. 1027	Fred Hampton	N
Badge No. 3566	Earl Baldwin	C
Badge No. 4720	L. E. Walker	C
Badge No. 3530	Arval L. Hulsey	C
Badge No. 220	Larry McCullough	C
STEEL ERECTION DEPARTMENT		
Badge No. 1022	Willie Key	N
Badge No. 1024	Horace Perry	N
Badge No. 1005	Louis Pinkard	N
STEEL CONSTRUCTION DEPARTMENT		
Badge No. 545	Samuel Harris	N
Badge No. 651	Elijah Knox	N
Badge No. 322	A. G. Richardson	N
MAINTENANCE DEPARTMENT		
Badge No. 1773	Eugene McGee	N
Badge No. 3377	Billy Joe Pickens	C

PUNCH, SHEAR AND PRESS DEPARTMENTS

Badge No. 2483	Glenn Acker	C
Badge No. 580	Robert Murry	N
Badge No. 563	William Simmons	N
Badge No. 555	Robert Sanders	N
Badge No. 1102	Henry Clayton	N

WHEEL & AXLE DEPARTMENT

Badge No. 2172	Jack Rodgers	C

FORGE DEPARTMENT

Badge No. 4585	Jerell S. Hammonds	C
Badge No. 1305	Matthew Hunter	N

STEEL MISCELLANEOUS DEPARTMENT

Badge No. 1364	James Taylor	N
Badge No. 1868	O. J. Herndon	N
Badge No. 318	Clarence S. Hearns	N
Badge No. 1832	Henry B. Moore	N

WOOD ERECTION DEPARTMENT

Badge No. 306	Edward Dancy	N

PAINT & SHIPPING TRACK DEPARTMENT

Badge No. 486	Henry Moore	N
Badge No. 4550	Orville Canoles	C
Badge No. 484	Willie Johnson	N
Badge No. 472	Edward Lofton	N

STEEL STORES DEPARTMENT

Badge No. 1162	Donald Foreman	N

TRUCK DEPARTMENT

Badge No. 770	T. L. Ratcliff	N

MISCELLANEOUS STORES

Badge No. 1814	Simmie Roberson	N

PLANT PROTECTION & JANITORS DEPARTMENT

Badge No.	Willie Thomas	N
Badge No. 3614	Clayton Wright	C

INSPECTION DEPARTMENT

Badge No. 4970	William C. Boyd	C
Badge No. 2958	Henry Hogg	C

PULLMAN-STANDARD
Bessemer Plant
HOURLY EMPLOYMENT FIGURES BY MONTHS
January 1958—June 1974

COMPANY EX. 351

TRANSCRIPT OF 1978 TRIAL

[17] MR. CLEMONS: Your Honor, we would now like to call as our first witness Mr. Thomas.

SAMUEL THOMAS, JR.,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q (BY MR. CLEMONS:) Mr. Thomas, will you state to the Court your full name?

A Samuel Thomas, Jr.

Q Where do you live, Mr. Thomas?

A Route 4, Box 55.

Q Are you employed by Pullman-Standard?

[18] A Yeah.

Q When did you go to work for Pullman?

A '46, January 2.

Q Was that at the Bessemer plant?

A Bessemer plant.

Q Are you a member of a union?

A Yeah.

Q What union are you a member of?

A 1466.

Q How long have you been a member of the union?

A Ever since '46.

Q Have you attended union meetings?

A Yeah.

Q Mr. Thomas, was there a time when union meetings were segregated?

A Yeah.

Q Would you describe how the segregation worked?

A Well, on the picnic they give on Labor Day, well, we will have our picinics would be in different places. The whites would be in one place, and the blacks in the other.

• • • •

Q Were there any social activities sponsored by the union on a segregated basis?

[19] A Well, I can't recall that. I don't know.

Q At union meetings did blacks and whites sit together?

A No.

Q Where did the blacks sit?

A They sat on one side, and we had one side.

* * * *

CROSS EXAMINATION

Q (BY MR. STELZENMULLER:) Mr. Thomas, the seating arrangement is the same as we have here today?

A Yeah.

* * * *

CROSS EXAMINATION

Q (BY MR. FALKENBERRY:) Mr. Thomas, the local union has not held any picnics since sometime during the 1950's, have they?

A Yeah, that is right.

* * * *

[20] THE COURT: Mr. Thomas, throughout the period that the picnics were held until sometime in the fifties, were they held as you have described, that is, one place for whites and one place for blacks?

A Yes, sir.

THE COURT: Now insofar as the meetings are concerned, you have said that for some period of time the meetings were segregated in that whites sat on one side of the union hall and blacks sat on another?

A Yes, sir.

THE COURT: Has that continued to be the case even at the present date?

A No. They sit like they want to now.

THE COURT: About how long has it been that you have noticed that the whites would sit on both sides and blacks on both sides?

A Well, that has been since—I would say since we had that trial up here. I can't recall the time. Back in '74.

THE COURT: Now prior to '74, back in the sixties, was there any actual attempt made by blacks to sit on what had been the white side or did it just continue the way prior practice had [21] developed?

A Well, no, they couldn't sit over there. They just didn't go over there.

THE COURT: When you say they just couldn't do it, did anybody ever try it?

A Well, asked the president, and they would tell him three times seven is twenty-one, and they want to know what to do, and that is the only answer he would give.

THE COURT: Say that again.

A They would ask the president, and he would say three times seven is twenty-one, and they know what they want to do about it.

THE COURT: What did that mean?

A I don't know. That is all he would tell us.

THE COURT: Three times seven is twenty-one?

A Yes. That means you're grown, I guess.

THE COURT: It means what?

A You're grown. You are a man. That is what I get out of it.

THE COURT: You understood him to say that people were grown men, and they would do what they want to do?

[22] A That is right.

THE COURT: Was this when some question came up as to whether it was all right to sit on both sides of the aisle, or whatever it was?

A No, it wasn't all right. We couldn't do it—probably they would do something to us, I guess. They just say we couldn't sit over there. So we just went and sat where we sat at.

THE COURT: How did it ever come up; was it in some union meeting where somebody got up and said why are we sitting like this, why can't we sit on the other side of the aisle? Was this what happened?

A Well, when we went to the union meetings, the president told us we couldn't sit over there. Said there is a white side and a black side.

THE COURT: And who was the president at that time?

A Paul Henn.

THE COURT: Was he white or black?

A White.

THE COURT: There have been periods of time, have there not, that blacks have served as officers of the union?

A Well, the secretary and vice president [23] I believe sometimes in the sixties, I believe—in the fifties.

THE COURT: In the fifties there were blacks who served as vice president and secretary?

A Yeah.

THE COURT: Well, actually even since the fifties, have there not been blacks who served as officers as well as whites who served as officers?

A Yeah. Blacks have been serving.

THE COURT: Has this been pretty much continuously since the 1950's that there have been both blacks and whites served?

A Well, there have been about I would say about half.

THE COURT: About half the officers were white and about half of the officers were black?

A Yeah.

THE COURT: Insofar as voting on any matters and insofar as talking in the union meetings about matters of both whites and blacks, had the opportunity to speak and to vote?

A Yeah.

THE COURT: So far as you noticed, was there any distinction made between the way a white could speak and vote and the way a black could speak [24] and vote?

A They all could speak and vote, yeah.

THE COURT: Now on the negotiating groups, when there were the collective bargaining agreements came up, were there both whites and blacks on those negotiating groups or just whites or just blacks or what?

A That would be something in the contract, wouldn't it? Negotiations would be like a contract, wouldn't it?

THE COURT: Right.

A Well, blacks and whites would leave. They would go.

THE COURT: I believe that is all. I, of course, am aware we have documentary evidence in terms of the—who the officers of the union and stewards have been, as well as their races over the years that was introduced in the last trial. And I have that available to me. But I wanted to inquire of this particular witness.

* * * *

[25] RECROSS EXAMINATION

Q (BY MR. FALKENBERRY:) Mr. Thomas, I understood you to say you went to work at Pullman in January of 1946?

A That is right.

Q Did you know Mr. Perry Thompson at that time?

A Yes, sir.

Q And Mr. Gus Dickerson?

A Yes.

Q Were they either officers or on the contract negotiating committee when you came to work at Pullman?

A Yeah.

Q And they are both black men, aren't they?

A Yes.

Q Did you know Mr. E. B. Jackson?

A Edward Jackson?

Q Right.
A Yes.
Q Was he a black man?
[26] A Yeah.
Q Was he also on the committee when you came to Pullman in '46?
A Yeah. There were some in the union.

• • • •

[26] THE COURT: Is it your recollection that generally when the union was discussing and considering contracts and changes in rules, that the whites [27] and blacks usually voted the same way or were there times when white union members would vote pretty much all one way and black union members would pretty much vote all another way?
A Well, I don't know about that. All I know is they stand when they vote.
THE COURT: Do you ever recall any kind of issue coming up during contract times or rules times where the blacks voted pretty much to a plan one way, and the whites voted pretty much to a plan the other way?
A I can't recall that.

• • • •

[27] WILLIE JAMES JOHNSON,

being first duly sworn, testified as follows:

• • • •

[30] Mr. Johnson, did you attend union meetings back in the fifties and sixties?
A Yes, I did. Beginning of '66 up until now.
Q At that time was the seating segregated?
A Yes, they were.
Q Were there separate restroom facilities [31] for blacks and whites at the union hall?
A Yes, there were.
Q Likewise at the company was there segregated facilities?
A Right.

Q Drinking facilities?

A Drinking facilities, bathrooms, locker rooms, everything was segregated.

Q How long did those segregated facilities at the company last?

A Until approximately June or July, 1967.

Q How long did the segregated facilities, that is, the restroom facilities at the local union last?

A Until about the same time.

Q Do you recall any discussions at a union meeting concerning a grievance of black workers?

A Grievance?

Q Yes.

A Yeah. We had an undiscriminatory contract had been negotiated in our basic contract.

Q When was this?

A In '63. And we had questioned the president about segregated job assignments at the plant. And he would always tell us, well, we have got white [32] jobs because you're going to stay on the black jobs, and the whites are going to maintain the white jobs. So about March of 1963, thirteen black employees were dropped, laid off, I mean, and thirteen junior whites remained in the plant. So we thirteen black employees filed a thirteen grievance saying the company was discriminating. And when we came to the union meeting that Tuesday night, the president, when he called the meeting to order, he had the thirteen grievances. And he held them up in his hand, and he said, I have thirteen grievances here, racial grievances that have been filed by thirteen black employees out in the plant against the company. And he criticized those thirteen black employees for filing such grievance. And I want the rank and file to tell me whether or not to tear these grievances up or process them. Well, one white man got up and made a motion that he tear them up. But we had the majority that night of blacks, and we voted it down, and made a mo-

tion to process the grievances. And we did win the vote. But the president did not process the grievances. And later we went to the National Labor Relations Board and filed discrimination charges there. At that same night the secretary was Gus Dickerson.

[33] Q Was Gus Dickerson a black man?

A Yes, he was a black man. But he got up and told us he was not going to process a racial grievance. It wasn't time for it, and he wasn't going to do it.

Q In your occupation as a member of the union during the fifties and early sixties, Mr. Johnson, did the black union officials press racial grievances or complaints of racial grievances at this time?

A No. They would always say there wasn't time for it.

Q The president of the union is now a black man, is he not?

A Yes, he is.

Q When did the union elect its first black president?

A In 1970, I think it was.

Q Who was that?

A Perry L. Thompson.

Q At that time had anybody ever run for president and lost?

A Yes. Perry had ran a number of times before.

Q I take it blacks had served as president—I'm sorry, as secretary, financial secretary and [34] vice president of the local?

A Yes, they have.

* * * *

[52] MR. STELZENMULLER: This chart contains certain other information. I would like to explain it, because I think it would be helpful to follow through that mass of documents.

As shown on the chart, the sources are given for the information contained in 1941 voting lists which is in evidence. The annual overtime bonus summaries for the

years '41 through '46, those are in evidence. The United Steelworkers checkoff list for 1946 which is in evidence. The seniority lists for 1947 to date, and the union contracts themselves. I think all we may have missed—did we miss any, Frank, or getting all—do we have an unbroken series of all the contracts—we have pretty close to it anyway.

The chart shows several things. It shows departments and changes in the name or changes in the identity of them from the period of 1941 up to now.

It shows the different bargaining units, because there have been several changes in there that we think are material as showing how certain [53] groups got broken out of other groups. Sometimes it was by reason of the NLRB's certifying in certain ways. It also shows changes in the seniority system at the Bessemer plant over that period, as shown by the key, the little gold dots, a couple of them on there indicate the IBEW bargaining unit. The columns are different points of time where a change took place. Not every year is indicated, because not every year was any change. The two gold dots up here signify the electrical, and had in there the NLRB's certification and were covered in their first union contract. As shown by the chart, the IBEW was decertified in 1946, whereupon the electricians went back into the maintenance department of United Steelworkers where they had been broken out. They became represented by the United Steelworkers and the power house which was that group of people also that went back into the steelworkers unit. But that didn't occur until June 1, '47.

Inasmuch as, and I will explain what the row of black dots mean. The significant thing occurred then.

The silver dots are the International Association of Machinists which are shown on the chart, [54] originally had five groups of people in the unit, that which is now called maintenance IAM, die and tool, wheel and axel, and the air brake pipe shop.

In 1944 this column shows when the IBE—the IAM certification was changed. There is testimony, I think, in Mr. Herring's deposition, of how that came about. At that time the machinists also—the NLRB changed these three groups out of the IAM and in to the United Steelworkers bargaining unit. For that reason they are shown with red dots. The red dots signifying, according to the key, United Steelworkers while departmental seniority prevailed, which it did at that time.

Finally the black dots refer to United Steelworkers departments or groups where occupational seniority prevails. Because for a period of time from June 1, 1947, to September 1, 1954, there was no departmental seniority system of the type that exists now, but seniority was applied by occupations which actually amount to classification within departments as shown on the charts. The International Association of Machinists which still represents unbrokenly represented certain maintenance employees and certain die and tool employees. They have always had a classification seniority system where [55] insofar as layoffs, recalls and the like are concerned, people are in competition only with members in their own classification. So there has been no change in IAM. There was a change in the United Steelworkers and a change back in 1954 to the departmental system.

Next to the last column is September 1, 1954. The last column says to present. There have been no changes at all in this system since that time with one exception, that this boiler house department, a new department created September 1, '54, became vacant. That is as shown on the 1964 senority list. There have been no hourly employees in that department since March 2, 1965.

We submit that the chart not only helps you follow through the different changes, and where different people came from, but also it will be significant to you in that it shows whereas there were a number of changes around

during the period when the occupational seniority prevailed, they didn't really have anything to do with seniority.

THE COURT: Let me just interrupt you at this point on a question I need now is whether or not there is objection to Exhibit 27. And I would take it that it would not be objected to. The [56] plaintiff may have a desire to, in some way, contradict something that is shown there by virtue of reference to other evidence, and may not agree with the methodology used. But I take it it should be received in the same way that Plaintiffs' Exhibit 110 was received.

MR. CLEMON: Well, Your Honor, we would object to the portrayal of the truck department as being a CIO department in 1942. Actually the truck department was certified as IAM was the truck department, was black by a letter gave to the CIO department, by the letter of December 19, I think it was, 1941.

Likewise, we object to the use of overtime bonus summaries as a basis for determining the departments that existed under the contracts. Those overtime bonus summaries, some of them are in evidence elsewhere in this case in the earlier hearing, and some of those would show that there is a department known as press, punch and shear, but in point of fact, we know them to be two departments. We say that the use of those overtime bonus summaries, while they might show what—how the company treated certain units, they don't show what the union agreed to and what was provided for in the contract. That [57] that would be shown by the seniority lists which are required to be kept by the contract.

THE COURT: Let me interrupt you just a minute, Mr. Clemon.

As I understand it, your Exhibit 110 is based upon the original voting list and upon the seniority lists that are 1947 and subsequent.

MR. CLEMON: Yes, sir.

THE COURT: And while there may be some differences between your compilation and this defendant's Exhibit 27, with respect to those years, it seems to me that is just a contradiction of evidence.

MR. CLEMON: That is correct.

THE COURT: The real question becomes the period of time between 1941 and 1947, and perhaps the significance of those changes. I really wonder if this is not an item where the matter should be allowed into evidence, but you're perfectly free to contradict or disagree with either the methodology or the conclusions to be drawn therefrom.

MR. CLEMON: Yes, sir. We will withdraw our objection.

THE COURT: Let's receive Exhibit 27, and it's not to be shown as any way binding on the plaintiff.

• • • •

EXHIBITS INTRODUCED AT 1978 TRIAL

PLAINTIFFS' EXHIBIT 1—FIRST DOCUMENT

[NLRB Voting List—1941]

PULLMAN-STANDARD CAR MANUFACTURING COMPANY
BESSEMER PLANT

EMPLOYEES ON PAYROLL—AUGUST 9th, 1941.

DEPARTMENT	WHITE	COLORED	TOTAL
PLANT PROTECTION	12	—	12
SUPERINTENDENCE	9	4	13
WOOD MILL	16	1	17
LUMBER YARD	29	—	29
WOOD ERECTION	60	26	86
PAINT	29	35	64
SHIPPING TRACK	7	5	12
SAND BLAST	—	—	—
PUNCH & SHEAR	33	65	98
PRESS	11	33	44
STEEL CONSTRUCTION	39	86	125
STEEL ERECTION	90	255	345
WELDING	50	—	50
WHEEL & AXLE	19	11	30
TRUCK	—	14	14
FORGE	32	26	58
DIE & TOOL	55	2	57
MAINTENANCE	57	13	70
TEMPLATE	3	—	3
STORES	6	1	7
STEEL MISCELLANEOUS	6	73	79
TOTAL HOURLY EMPLOYEES	563	650	1213
TOTAL SALARIED EMPLOYEES	55	—	55
TOTAL EMPLOYEES ON ROLL	618	650	1268

PLAINTIFFS' EXHIBIT 1—SECOND DOCUMENT

PULLMAN-STANDARD CAR MANUFACTURING COMPANY
BESSEMER PLANT

SUPERINTENDENCE DEPARTMENT

BADGE	COLORED OR WHITE	NAME	OCCUPATION	REMARKS
171	Col.	Herman Hayes	Janitor	
172	Col.	Edgar Sanders	Dispensary Aid	
173	Col.	Letcher Pickens	Laborer	
175	Col.	Albert G. Wynn	Janitor	
201	White	Oscar Morris Bryan	Blue Print Operator Tracer	
202	White	James C. Sutherland Jr.	Clerk	
203	White	James W. Bonham	Blue Print Operator	
204	White	Rose Lee Jacobs	P.B.X. Operator & Stenographer	
205	White	John E. Loveless, Jr.	Blue Print Boy	
206	White	Dorothy B. Windsor	Stenographer	
207	White	John F. Suttle	Co-op Student	
209	White	Newman Rex Huey	Inspector	
210	White	Harold W. Falter	Sample Car Man	

PLAINTIFFS' EXHIBIT 13

[1] BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TENTH REGION

X-R-468

IN THE MATTER OF:

PULLMAN-STANDARD CAR MFG. CO.

and

STEEL WORKERS ORGANIZING COMMITTEE, (CIO).

Court Room, Federal Building,
Birmingham, Alabama,
Thursday, August 28, 1941.

The above-entitled matter came on for hearing, pursuant to notice, at 10 o'clock a.m.

BEFORE:

JOHN C. McREE, Trial Examiner.

APPEARANCES:

WILLIAM E. MITCH, Jr., 920 Massey Building, appearing for Steel Workers Organizing Committee, Local No. 1466, Birmingham, Ala.

NOEL R. BEDDOW, Steiner Building, appearing for Steel Workers Organizing Committee, Local 1466, Birmingham, Ala.

JELKS H. CABANISS, First National Bank Building, Birmingham, Alabama, appearing for Pullman Standard Car Manufacturing Company.

J. R. MAY, 1008 Carter Hill Road, Montgomery, Alabama, appearing for International Brotherhood of

Electrical Workers, Local Union #B-287, P.O. Box 2377, Birmingham, Alabama.

J. H. HOWARD, Machinists' Building, Washington, D.C., appearing for International Association of Machinists.

[2] J. D. BAUMGARDNER, 209 Clark Building, Birmingham, Alabama, appearing for International Association of Machinists.

J. L. GIGLIO, 500 Lyric Building, Birmingham, Alabama, appearing for Federal Labor Union, affiliated with the American Federation of Labor, 500 Lyric Building, Birmingham, Alabama.

---

[3] PROCEEDINGS

TRIAL EXAMINER MC REE: The hearing will come to order.

This is a formal hearing in the matter of Pullman-Standard Car Manufacturing Company and Steel Workers Organizing Committee, Case No. X-R-468, before the National Labor Relations Board.

* * * *

[4] TRIAL EXAMINER MC REE: Both you and Mr. Baumgardner are appearing for the International Association of Machinists?

MR. HOWARD: That is correct.

* * * *

[12] TRIAL EXAMINER MC REE: It is stipulated and agreed by and between the Pullman-Standard Car Manufacturing Company and the Trial Examiner for the purpose of this hearing only, that the Pullman-Standard Car Manufacturing Company operates a plant at Bessemer, in Jefferson County, Alabama; that the

said company is a corporation under the laws of the State of Delaware, qualified to do business as a foreign corporation in the state of Alabama.

The said company, during the week ended August 9, 1941, had on its payrolls, in connection with its operations at said plant, a total of 1268 employes.

The company is engaged in the manufacture of railroad cars. Its current production is at the rate of about 27 box cars made of wood and steel, and 20 all-steel or hopper cars per work day. All cars, after manufacture is completed, are delivered f.o.b. Bessemer to Class I railroads engaged in interstate commerce.

* * * *

[27] TRIAL EXAMINER MC REE: I think it is advisable at the outset of the hearing, so we can possibly save some time, for the intervening unions to make a statement, if they are in position to do so at this time, as to what their contention is as to the appropriate bargaining unit or units.

Of course, we have the petitioning union outlining its position in its petition, that is, that the unit should consist of an industrial unit in which all production and maintenance employes are eligible, exclusive of foremen, superintendents and clerical forces.

Now, that is the contention of the petitioning union, is it not?

MR. BEDDOW: That is right.

TRIAL EXAMINER MC REE: Now, I want a statement from the intervening unions as to their contentions as to the appropriate unit, so as to save us some time in our proof.

MR. MAY: Mr. Examiner, the International Brotherhood [28] of Electrical Workers contends that the appropriate unit for its organization includes all electrical workers employed in the maintenance department, power and sub-station operators, exclusive of supervisory and clerical forces.

[29] TRIAL EXAMINER MC REE: It is your contention, then, if I understand you, Mr. May, that there should be a separate unit which should include all your electrical workers in the company who are working in the maintenance department, the powerhouse or sub-station.

MR. MAY: In the powerhouse and sub-station as powerhouse or sub-station operators.

TRIAL EXAMINER MC REE: As operators in those places, exclusive of any supervisory employees.

MR. MAY: Yes.

TRIAL EXAMINER MC REE: Do you know how many employees are in that unit?

MR. MAY: To the best of my knowledge, Mr. Examiner—I have not checked the payroll,—but, to the best of my knowledge, approximately 20 men are employed, more or less, approximately 20 men, I don't know just how many. I am of the opinion that it is less than that.

TRIAL EXAMINER MC REE: About 20?

MR. MAY: Yes, sir.

TRIAL EXAMINER MC REE: What is the contention of the Machinists?

MR. HOWARD: The International Association of Machinists contends to have a bargaining unit covering the machinists, apprentices and helpers coming under the wheel and axle shop, that is, exclusive of the clerical and supervisory [30] forces.

Our contention is for the bargaining unit to cover all machinists, apprentices and helpers in the maintenance and the other departments where they work, namely, the wheel and axle shop, the machine shop, the tool and die shop, and the welders, and the airbrake department.

TRIAL EXAMINER MC REE: You want all machinists, all machinist apprentices and helpers in the wheel and axle department, the die and tool department,

the machine shop, the airbrake department, and all welders in all of the departments?

MR. HOWARD: That is right.

* * * *

MR. HOWARD: That is right. Mr. Examiner, later on, we would like to define what we contend is machinists. In other words, a classification of the work in the department.

TRIAL EXAMINER MC REE: You will, of course, have an opportunity to put on your proof to support your contention. What I am trying to get now is just a preliminary statement.

How about the Federal Labor Union?

MR. GIGLIO: Mr. Examiner, the Federal Labor Union, the [31] affiliated union of the American Federation of Labor, is covering all workers with the exception of electricians, the crafts that the Machinists claim, leaving out foremen, whose authority is to hire and fire. We will take the rest.

TRIAL EXAMINER MC REE: How about clerical employees?

MR. GIGLIO: We take them, too.

TRIAL EXAMINER MC REE: If I understand you, then, you are asking for a unit to consist of all employees other than those that the electricians claim in their unit, and those that the Machinists claim in their unit, and the supervisory employees.

MR. GIGLIO: That is right.

TRIAL EXAMINER MC REE: And the unit is to include the clerical forces.

MR. GIGLIO: That is right.

TRIAL EXAMINER MC REE: Well, now, in looking over this payroll, I have seen references to watchmen and plant protection employees.

MR. GIGLIO: We take those.

TRIAL EXAMINER MC REE: You take those in?

MR. GIGLIO: Yes, sir.

TRIAL EXAMINER MC REE: Does the company have any position to take on the appropriate bargaining unit?

MR. CABANISS: It does not, sir.

TRIAL EXAMINER MC REE: Mr. Beddow, are you ready to [32] put on your proof?

MR. BEDDOW: Yes, sir, we are ready.

MR. MITCH: Off the record, Mr. Examiner.

(Discussion off the record.)

MR. BEDDOW: Mr. Sleeman, will you take the stand, please?

W. C. SLEEMAN

called as a witness by and on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER MC REE: Give your full name and address to the reporter.

THE WITNESS: W. C. Sleeman; The Pullman plant.

DIRECT EXAMINATION

Q (By Mr. Beddow) What is your position, Mr. Sleeman?

A Plant manager.

* * * *

[34] Q Now, in this business, about how many men do you have employed there at this time in the plant at Bessemer?

[35] A My last recollection of the payroll I looked over is, we had approximately 1268 on the rolls.

* * * *

Q Now, what are the duties of [the] electricians?

A An electrician in our plant is hired for the purpose of maintenance work. We have them working throughout the plant in the different departments. As a

rule, when we are operating to full capacity, we find that it is economical to have an electrician in each department. For instance, on the track, we have so many hoists that we find that where they are continually being misused, or something is the matter with them, why, the man is on the job to immediately repair them, so as not to hold up production.

Q Do they maintain your electrical equipment, such as winding armatures, and such as that?

A We, as a rule, wind our armatures. However, we very frequently, in case of necessity, and sometimes it is to our advantage, to have them wound on the outside. We have a combination man who is the armature winder.

Q But these men are all over your plant keeping up this [36] equipment, is that true?

A No, not all of the electricians. We have some that work in the electrical shop, that do repair work in the shop, where it cannot be done on the job.

Q What kind of repair work?

A Repairing reamers. We have, probably, three or four hundred electrical reamers, and when they get out of commission on the track, they are carried back to the electrical shop, where that reamer is repaired for the track's use.

Q They also repair various equipment there, such as your cranes and motors?

A Cranes cannot be repaired in the electrical shop. Sometimes, motors are taken there, but, as a rule, the crane work is done right on the job.

Q Now, how many cranes do you have on the job, Mr. Sleeman?

A We have six in the main bay; we have three, we just added another one, which makes four, in the second bay, and one in the wood mill, and one in the wood erection, and we just added another one in a new crane runway.

Q And are they stationary or bridge cranes, or what is their description?

A They are all bridge cranes.

Q Extending the width of your building?

A Yes.

[37] Q Now, let us go back to that little repair shop.

A Yes, sir.

Q How many men are employed in that little repair shop you say you have?

A They vary from three or four.

* * * *

[38] Q Let us go back for one minute to the electricians there. There was one question called to my attention. Do you have a powerhouse out there?

A We have a sub-station. I would not class it as a powerhouse. A powerhouse is a place where they usually make power. However, we do have one small turbine, which was recently put in, as stand-by, the stand-by turbine to cut down demands. Outside of that, there is just a sub-station.

Q Now, who do you work in this sub-station? Is it an electrician, a mechanic, or how do you classify him?

A We classify him as the powerhouse operator.

[39] Q He is not classified as an electrician?

A No, sir, he is a powerhouse operator.

Q To your knowledge, is he an electrician?

A To my knowledge, I would class him as an electrical man, that is, a man who is capable of taking care of electrical appurtenances, which he must do in that powerhouse.

* * * *

Q Now, just what do you class as machinists, Mr. Sleeman?

[40] A In our shop, we class machinists as men who, that is, general, all-around machinists, mostly who do maintenance work. We have an awful lot of die work

on which we use machinists, when they are not working on this maintenance work.

Q Do you employ in this machinist's work very many apprentices?

A We have some few apprentices. They are young fellows who are coming along that we are trying to make machinists out of.

Q Now, as to helpers, do you have very many helpers?

A We do not have so very many helpers. Usually the apprentices are, we call them handymen, they act as helpers. They are the fellows that fit up the dies.

Q Now, are those helpers or apprentices all white, or partially white and partially negroes?

A I presume you are talking about the machine shop now?

Q That is right, we are still on the machine shop.

A The best I recollect, we have one colored man in the machine shop, and that is the fellow for sweeping out, I don't know now whether that man is there or not.

Q You don't know how many apprentices or helpers you have?

A No, sir.

Q And you couldn't tell whether they are white or negro helpers?

[41] A I don't know. I know we do not have any negro helpers. We never had. We had one clean-up man who was a negro.

Q That is in the shop?

A That is in the machine shop.

* * * *

[43] Q (By Mr. Beddow) Now, [concerning welders] duties about the plant, are they all over the entire plant where there is welding going on?

A The electrical welders in the maintenance department, yes. Their duty is to be all over the plant and in the machine shop. The electrical welders on the produc-

tion part of the work are confined, more or less to a specific location.

• • • •

[44] Q (By Mr. Beddow) we were attempting to negotiate a contract with you from June until September?

A Yes, sir.

• • • •

Q Now, at that time, was there any question, or did the electricians or machinists, or any labor organization, or [45] Federal Labor Union, approach you for a contract?

A Not as I remember.

• • • •

Q Do you remember the kind of contract we presented to you at that time?

MR. CABANISS: You mean, as to the bargaining unit?

MR. BEDDOW: As to the bargaining unit.

THE WITNESS: No, I don't remember the entirety of it. I read it over once, and when I received a letter from the National Labor Relations Board, I didn't go into it any further; I didn't go any further into it, or do anything further about it.

MR. CABANISS: Mr. Sleeman, I don't believe you understood his question. His question was, did the contract that he presented to you purport to refer to the SWOC as the bargaining agency for all of your employees.

[46] THE WITNESS: I will say it did, as far as I remember.

• • • •

[47] Q (By Mr. Beddow) And you have been operating as a single group, is that right, similar to the group that we are asking you to sign with us in our contract?

A Well, we operate by departments. We have the steel erection department, who place the cars, the con-

struction department, and the wood mills. They are all different.

Q But they operate as a whole?

A Each one of them operates, the wood mill operates as the wood mill, the wood erection as the wood erection. They have nothing to do with the machine shop.

The powerhouse operates as the powerhouse. The machine shop operates as the machine shop, but the maintenance men are all over the plant, they do not engage in production; you see, they differentiate there. The production and maintenance are different.

* * * *

[48] Q (By Mr. Mitch) Mr. Sleeman, I didn't get this exactly straight. Mr. Beddow was asking you about a break-down of the people that work in the plant, you stated there were men that were designated as machinists, and I believe you stated that of that class you classified the people working in the die casting shop as machinists, is that correct?

A Not altogether. I did make this statement: I classed the machinist as a man who is capable of doing machine shop work; that is, any kind of machine shop work. Very often the breakdowns are not such as to keep that class of man busy, and we frequently use them on die work, complicated die work. The men that work on these dies are handymen and apprentices.

Q In other words, you have people working in the die shop that you classify as machinists?

A That is right.

[49] Q And that number, you stated, were not kept busy all the time on one task. That is, they varied their work?

A That is in the maintenance end.

Q When you have a man classified as a machinist, what does he do, when he is off as a machinist, and is placed in the die casting shop. Now, when there is no work available for him, what does he do?

A You mean, when there is no work available in the dies?

Q Yes.

A We get rid of him.

Q I understood you to say he is moved from one part of the machine shop into the die shop.

A No, the men move around the shop, but in the die shop the men who are high class machinists are kept at machining. They keep up the machining work for the maintenance end. Now, when that fellow has no work there, he is put on the complicated die work.

Q I believe you also stated that was true of the machinists who work in the repair shop?

A That is right.

Q Sometimes they work, when that work does not keep him busy, he is moved and employed in other parts of the plant?

A Yes, sir, that is right.

Q You stated, however, on the welders you had, when work is not available for a man who is hired as a welder, he is [50] occupied otherwise in the plant, is that true?

A That is true. We have additional work in sight where we may put these welders on. Right now we are going through an expansion, and rather than to leave the welders go, we will put them on doing other welding, structural work, while we are building little structures, building.

• • • •

CROSS EXAMINATION

• • • •

[By Mr. May] Now, who is the head of this electrical shop, who is the foreman or the leader, or just what classification do you put on that man?

We have a foreman over the maintenance department who is in charge of the millwrights and the electricians.

• • • •

[62] Q Now, you testified about two classifications of welders, one production welders and the other maintenance welders?

A Yes.

Q Now, does that foreman have charge of all of the welders?

A That foreman, as a rule, is the production man. However, in the case of the machine shop it has only been in recent years that the company welded cars, and prior to that we always had a welder in the machine shop doing both acetylene and electric welding, but since then we, more or less, have this one welder looking after, generally, with the other welders—by that I mean we have these maintenance welders and if we have trouble in another place to get welders, we might pull that man down to assist them.

• • • •

[63] TRIAL EXAMINER MC REE: Come to order, please.

Q (By Trial Examiner McRee) Before you go into those lists, Mr. Sleeman, there is one question I would like to clear up in the record. I would like for you to explain, briefly, what your operations are, that is, starting with your first manufacturing process and taking it on through to the finished product. Of course, I don't want you to go into minute detail, but briefly tell us what manufacturing steps you have in these various departments.

A All right, sir. We make two types of cars, all-steel cars and composite cars. The composite cars are steel cars with wood lining and wood floors. Both the all-steel cars and the composite cars are run through the steel shop in practically the same manner, that is, by taking, first, the steel and fabricating it.

Q First, let me ask you, now, of course, you do not roll any steel yourself?

A We do not roll any steel. We do not make any castings. [64] We do, however, make drop forgings.

Q You buy your steel and buy your castings, then?

A All of our steel and all of our castings are bought; and, we do not have any lumber. We buy the lumber.

Q Now, briefly, just go ahead and tell us what these processes are?

A The steel is fabricated, as well as the castings we buy are fabricated in the so-called big shop by punching holes and pressing them into various shapes. They go from that location, the fabricated parts, down to the construction department where they go through a series of sub-assembly work. The parts are riveted together, or welded into some component parts. From there they are taken down into the steel erection shop, and at the steel erection shop, at one side of the building, we have a welding department where these pre-fabricated parts are welded into sub-assembly parts, the same as the construction department has riveted parts. These are then moved down to the steel erection shop and the car is started in the first position. Different parts are put on it, and then, as it progresses down the steel erection track, these different pre-fabricated parts and pre-assembled parts are applied to the car.

Q Will you go into that in a little more detail? Let me go into a little more detail with you. Do you make the wheels in this plant?

[65] A The wheels are not made there. That is a casting, as a rule.

Q Well, now, do you buy finished castings, that is, a casting that has already been machined, that is a wheel, or do you buy the rough casting which has to be machined in this plant to make the wheels?

A The wheels are bought ready for use with the exception of the final boring of the wheel to fit the axles. The axles are also bought outside. We do not make those, but, we finish the axles. They are furnished to us rough turned and we finish them and mount the wheels on the axle, and then the trucks are built and put on the axles and the wheels, and it is moved over, and then, this car is set on the axles and the wheels and the trucks and the cars run down the steel erection track, and when it comes out of the steel shop it is a complete car with the exception of the wood, and when the car is an all-steel car it is then painted as soon as it comes out of the steel shop. Then, it is moved over the paint shop, that is, the all-steel car. It is moved over to the paint shop where it is given another coat of paint and stenciled and then it is taken down and weighed and shipped.

Now, on the composite cars, where they have wood on them, after the car comes out of the steel shop it is given its first coat of paint, and then it is transferred over to the wood erection shop. Now, the wood erection shop, certainly, has [66] to be furnished material, so we have what we call a wood mill. In this wood mill lumber is fabricated similar to what we do in the steel shop.

Q What do you buy, rough lumber, undressed lumber, or do you buy dressed lumber?

A That all depends on the grade. Sometimes we buy finished lumber.

Q Do you have a planer?

A Oh, yes, we have planers, grainers, borers and the usual machinery that is used in a freight car plant for wood fabricating. After this wood is fabricated, it is transferred down to the wood erection department where it is applied to the steel cars in a progressive manner,

the same as the steel cars are built. That is, in the first position, they put on the floors and—

Q Sort of assembly line operation?

A That is right. They have probably, I think, twelve positions over there, and the first erection is to put in the floor boards, and the car moves down and then they buck the floors down, and they then bore the holes, and then the next movement is where they nut the bolts up, and then they put the lining on, and then the next movement is the nails, after they put the lining board on. It is a progressive system of work, and after it is out of the wood shop it is moved to the paint shop and given another coat, stenciled, weighed and shipped.

* * * *

[68] Q (By Trial Examiner McRee) Will you refer to those lists, Mr. Sleeman, and tell us the number of electricians that you have working in the plant, that you have classified on your payroll as electricians?

A Seventeen in the maintenance department.

Q And do you also have, or, can you tell us the number of [69] employees you have in the powerhouse?

A Four.

Q Are those all operators that you have already described their duties, I think, when Mr. Beddow was questioning you?

A No, there are two operators and two helpers.

* * * *

Q Now, can you tell us the number of people you have classified as machinists?

A We have nineteen as machinists.

Q Now, what department are they carried in on the payroll?

[70] A They are carried in the die and tool department.

Q Do you have a department listed on your payroll as "Machine Shop"?

A No sir, the only department is the die and tool department.

Q And you have nineteen listed in the die and tool department classified as machinists?

A Yes.

Q Can you tell us, briefly, what the duties of those particular men are?

A Those men are the men who we classify as men capable of doing general machine shop work, like maintenance, and they can do repair work and are capable on machines—

Q Are those men who are classified as machinists, do they devote all of their time to maintenance work, that is, repairs, and the making of repair parts around the plant?

A As a rule, yes, that is what they are hired for, but, there are some times when we find that there is not enough maintenance work and they may be put on helping on dies and machining dies and stuff like that.

Q Will you explain briefly for the record what the dies are and how they are used in your manufacturing process?

A It is a very important part of car manufacture, because the dies are made of castings that are machined on the backs so that they will fit together and press various different [71] parts that go to make up a car.

Q These are dies that go in presses, is that correct?

A They are used on presses.

Q They are used on presses and you place sheet steel in there to form the various parts?

A That is right.

Q And are those dies manufactured or made in your plant?

A The castings are bought.

Q Are the castings bought in the rough?

A In the rough. However, in many cases we like to buy castings which we can use the rough surface on to

press on, because it lasts longer and it has got a hardened side to it and presses more material. However, the castings are bought in the rough and machined in our die and tool department.

Q Now, what work do these machinists, in particular, do with these dies you are talking about when you do not have enough maintenance work?

A Well, they machine them so they will fit together.

Q In other words, they are repairing or working on the dies proper?

A That is right.

Q In other words, they do not operate the presses?

A No, the press is in the production department.

* * * *

[72] TRIAL EXAMINER MC REE: I am trying to get it clear in the record.

* * * *

Q What I am trying to get at is, do they spend most of their time on maintenance work or on the die work?

A I will say yes, they do.

* * * *

[74] Q Can you tell us how many apprentice machinists you have?

A Well, in that department we have twelve die men and we have three apprentices.

Q Now, twelve die men. Let us leave the die men for the time being and go to the apprentices and helpers first.

A We have three apprentices and one co-op student.

Q Now, these apprentices, are they learning the machinist's trade?

A They are learning the machinist's trade.

Q How do you handle the apprentice system in your plant? Does the man go to work as an apprentice or does he go to work as a helper?

A Well, we usually classify him as an apprentice. We haven't any helpers down in our department. They go in as apprentices.

Q And you say you have three and a co-op student?

A Yes.

Q This co-op student is a student who works part of the time and then goes to school part of the time?

A Three months work and three months in school.

Q And does this same student come back and work in your plant each three months?

A He is the same student.

Q You do not change students?

[75] A No.

Q How are the apprentices paid?

A Well, I don't remember their rates. The best I recollect, they are on 48½ cents now.

Q They are also paid by the hour?

A Yes.

Q How long does an apprentice have to work as an apprentice before he is rated as a machinist? Do you have a set period?

A We do not have any set period, it just depends on how fast he is and capable of accepting the work.

Q Are there any intermediate steps this apprentice has to go through before he is classified as a machinist?

A No, they usually say he has got to work about four years. In fact, we have had a couple of machinists there that have gone through all of the steps. They put them at each machine we have and try to give him a varied experience, that is the apprentice.

Q You say you do not have any helpers in that department?

A No.

Q What are the other classifications?

A Well, we have what we call machine operators on these castings we talked about that are machined, but that is purely and simply a production job. They are lifted up there, probably eight or ten castings on the bed of the planer, and they just hog the metal off to a certain dimension, or approximate [76] dimension. There

is no fine, skilled machining. It is a very rough cut. Then, they are taken from there and taken over and drilled on an automatic jig where we have, probably, eight or ten drills that come down and drill the castings at one lick. Those are machine operators. We have five of those.

Q Do they have a different rate of pay from your apprentice machinists?

A Oh, yes, they are production men. They are given so much a hundred. It is piece work for them.

Q Piece work for them, but that work is done in your machine shop?

A Yes.

Q And these same machines they work on, are those same machines also used by the machinists for other types of work?

A Very frequently we have a machine that has castings on which are of such size that we often run across dies where we have to pull that work off and put the other dies on there on account of the size of the machines, and in that case, why, of course, the machinist does the work.

Q But the machinist works on an hourly rate?

A Oh, yes.

Q How many of these machine operators do you have?

A Five.

Q Now, are they listed on your payroll as machine operators, or do you call them machinists?

[77] A We call those planer operators and drill press operators. That is what they are on the payroll as.

Q They are either operating the drill press or operating a planer?

A That is right.

Q Now, do you have any other employees in that department?

A No, that is all.

Q To refresh your recollection, don't you have two crane men?

A No, they come under the crane men. I said that was all there is. The tool room men in this department, in the machine shop—

Q You mean in the tool and die department?

A Yes.

Q What are their jobs?

A They have charge of the tool rooms dispensing tools for the machine shop and some of the tools for the other departments. However, we have other tool rooms throughout the shop. That is not the main tool room.

Q How many of those men do you have?

A We have two tool room men and two helpers.

Q Do they do anything other than just keep up with the tools and give them out?

A Oh, yes, they do little jobs like grinding tools.

Q Sharpening tools?

[78] A Sharpening tools and stuff like that.

Q They are not tool makers?

A Oh, no, the tool makers are in the forge department.

Q How are those men paid?

A These men?

Q Yes.

A By the hour.

Q Do you have anybody else in that department?

A No sir, not in the tool room, not in that particular department.

Q I am talking about the tool and die department?

A We have some helpers, and these helpers are called handymen. We approximately have, maybe, four or five of those. They vary on the different payrolls. It just depends on the kind of work, and we have a hooker.

Q What is a hooker?

A A hooker is a fellow that hooks for the craneman.

Q Do you have craneman working in that department?

A Yes sir, we have one craneman in that department.

Q You have to have an operator on each shift, then, on that crane?

A Yes.

Q Are they carried on the tool and die department?

A Yes, they are covered in the tool and die department. They are called the crane operators who are carried in a [79] separate department.

Q They just work in this one department?

A Yes sir.

Q They do not work on the crane in other departments?

A No, those are white men.

* * * *

[82] Q Now, then, those welders, I believe you already testified, are paid on a piece rate basis?

A Yes sir.

Q And they work under a welding foreman?

A Yes sir, they work under a welding foreman.

Q And you have how many maintenance welders?

A We have what we call repair welders.

Q Are those the men you referred to here as the maintenance welders?

A Yes, sir, three men.

Q They are the most skilled?

A Yes.

Q Where do they work, where is their usual place for working?

A Well, we usually have one in the tool and die department, but at the particular time there is two in the tool and die department and there is one in the maintenance department.

Q What other maintenance department do you have other than the tool and die?

[83] A I didn't get that. There are two welders, repair welders, that are now working in the tool and die department.

Q Where is the third one?

A The third one works with the maintenance department. By that I mean a man who goes all over the shop.

Q In other words, you do not have him in any particular room?

A That is right. For instance, we might have some breakdown, maybe a frame or a casting would break down on the track, and we would send that man down there to do that.

Q Do those three welders work under the same welder foreman as the production welders?

A We have had them in different conditions. Sometimes they work under the die and tool and sometimes under the welding. We try to keep our welders, all our welders, under one man.

Q Now, at the present time, those two in the tool and die department, do they work under the welding foreman?

A We have a die and tool man and I think they are generally under the die and tool man and the head welder, and the maintenance welder is under the maintenance man and the head welder. In other words, the die and tool man has charge of the men, but the welding man has charge of the welding, because the welding supervisor must see that all of the welding comes up to specifications, so that is why we have to have, more or less, a joint combination or control of that plant.

* * * *

[84] Q Now, can you tell us briefly about the airbrake department.

* * * *

THE WITNESS: I can tell you, generally, about the pipe men.

TRIAL EXAMINER MC REE: Is that what you call the airbrake department, the pipe men?

THE WITNESS: Yes.

Q (By Trial Examiner McRee) How are they listed on the payroll?

A They are listed on our payroll as production men. Their work is entirely different than the maintenance pipe men.

Q Is it their job to install the airbrakes on the cars?

A The airbrakes and the pipes, the fabricated pipes, whereas the maintenance men fabricate their pipe in an entirely different [85] place and their work is different.

Q Can you take this payroll and tell us the approximate number of men in the airbrake department?

A I probably could get it out of my head quicker than I could on that.

Q All right, sir, give us the approximate number?

A Let's see. We probably have fifteen men in that department, that is as of that date.

Q That is as of August 9th?

A Yes sir.

Q And that would probably be approximately the same as of today?

A No, it would not, not as of today, because one track is down now.

Q Well, this airbrake department is just a part of your production line?

A That is right.

Q And they work under the steel construction department?

A That is right, sir, the steel erection department.

Q The steel erection department?

A Yes.

Q Of course, they work on both steel cars, all-steel cars, and steel and wood cars?

A Yes.

Q Do these fifteen men that you mentioned all do the same [86] sort of work?

A No, they do different classes of work, but they all work on pipe.

Q They are all applying, cutting, or shaping, or installing this pipe?

A That is right. Some of them apply it, some of them shape it, some of them put on the angle bolts before it is put into place, some of them ream the pipe out, some of them put "U" bolts around the pipe to hold on the pipe, and that is all on the application and the fabrication of the pipe.

Q You do not classify them as pipe fitters?

A No, we call them pipe men. We do not classify them as maintenance pipe men. We do not classify them as pipe fitters.

* * * *

[87] Q Do these men have any specific machines that they work on?

A The fellow that fabricates the pipe does, he has a pipe bender and a pipe threader, and a pipe cutter.

Q Of course, you buy all your pipe, you do not make any pipe there?

A No, the pipe is all bought.

Q And you cut it to the proper length?

A Yes.

Q And bend it?

A Yes.

Q And thread it?

A Yes.

Q And put the various cut-offs on?

A Yes.

Q Then, these men work, mostly, with the sort of tools that a plumber works with?

A Yes, I would say yes, only we have developed tools to eliminate the use of a lot of wrenches, where it is done by air. You just take the pipe and stick the angle

on the holder and come on and slip in the pipe and tighten it up, and you get a better fitting pipe joint. I wouldn't class it entirely like plumbing. It is not plumbing. It is production work.

Q Do those men work, do they do work in any other departments?

[88] A No sir, just in that department.

* * * *

Q First, tell us what is the wheel and axle department?

A The wheel and axle department is the department where these wheels are sent to us unbored. They have a rough bore, rather, a rough core. We bore those wheels to the dimensions to fit the axle. The axles are received by us rough turned and we machine them to fit the wheel. The two of them are pressed on together and that comprises the extent of the wheel and axle department.

Q Approximately how many employees do you have working in that department?

A Considering the night and day shifts, I would say we probably have sixteen, or maybe eighteen to twenty men.

Q Now, is that a part of your assembly line, or is this a step that takes place before it reaches the assembly line?

A This is a preliminary step that has got to be done before [89] the trucks are assembled. It does, however, work in unison with the building of the trucks. In other words, we like to coordinate the fabrication and the boring of the wheels and the fabrication of the axles and the building of the trucks, and coordinate them with the building of the cars on the track, because there is only a limited amount of room and they have got to more or less coordinate.

Q Is that classified as a separate department, or is it a part of one of your larger departments?

A It is classified as a separate department, the wheel and axle and truck department is known as one on the payroll.

Q Wheel, axle and truck?

A Yes sir.

Q How are those employees paid?

A On piece work, with the exception, of course, of the foreman. That is the only man that is not on piece work, and the leaders.

Q You have a separate foreman for that department?

A Yes sir.

Q And then a leader on each shift?

A Yes.

Q Are those three men included in the figure you gave of the total number of employees?

A No sir, they are production men that I gave.

Q Do these employees there do any work in any other depart- [90] ments, or is all of their work concentrated in this wheel, axle and truck department?

A Their work is in that department. However, we sometimes have short periods and we try to move the men there.

Q But as long as the department is running they do their work there?

A Yes, they are confined strictly to that.

Q They do not do any work in the steel construction department?

A No sir.

Q Or the tool and die department?

A No sir.

* * * *

[91] Q Now, you mentioned some millwrights?

A Yes.

Q What department do they work in?

A The millwrights come under the maintenance department.

Q Now, this maintenance department, that is your overall-maintenance and repair crew?

A Yes.

Q Under whose supervision do those employees work?

A W. H. Stamps, who also has charge of the electricians.

Q The electricians, then, are part of the maintenance crew?

A That is right, that is the maintenance crew.

Q What is he, a master mechanic, Mr. Stamps, do you classify him as such?

A You might call him a master mechanic, although we do not classify him as that. We have him as foreman of the maintenance department.

Q Now, your millwrights perform the ordinary duties of millwrights, they make various repairs of different kinds?

A That is right.

• • • •

Q Do they devote all of their time to millwright work?

A Yes.

Q They do not do any production work?

[92] A No sir.

Q They do not work in the tool and die shop, or in the production end?

A Not on production. They probably go in there in connection with, if they are doing a certain repair job to a machine, it may be that they wanted a certain thing turned, and they might go in there and help the fellow and show him what they want, or might go and cooperate with the machine shop.

Q As far as going in and helping in the machine shop on the machine, they don't do that?

A They might go in there, if they wanted a casting drilled, if the fellow was busy, they might put the casting on there themselves and drill it.

Q How about their rates of pay, compared with the machinists?

A I would say they are about in line with the machinists.

• • • •

Q But these millwrights are never transferred?

A No, they are all over the shop.

[93] Q I mean they are not transferred to other work?

A No, we don't put them on production.

TRIAL EXAMINER MC REE: I think that is all.

Q (By Mr. May) Mr. Sleeman, you testified that Mr. W. H. Stamps was your foreman of the maintenance department?

A Yes.

Q Now, isn't there a foreman in charge of the electricians?

A We have an assistant foreman or a leader, as we call him, who has charge of the electricians. We also have a man in charge of the millwrights.

Q Now, this electrician, the lead electrician, what is his name?

A Marsh.

• • • •

[94] Q Now, the powerhouse men, the four powerhouse men, under whose supervision are they?

A Under Stamps and also Marsh.

Q In other words, Mr. Marsh is their immediate superior?

A He is the leader or foreman, that is right.

Q Is it the practice for your electricians to be transferred from maintenance to production work?

A We do not use any electricians on production work.

• • • •

[95] Q They are hired as electricians?

A Yes, that is the number I gave you. They were electricians.

Q And these men work over the plant and perform maintenance, and are under the immediate supervision of Mr. Marsh?

A That is right, sir.

* * * *

[96] Q How many men, as you recall it, have you got in this one corner of the building of what the men call the machine shop?

[97] A These are the men in that department that I included.

TRIAL EXAMINER MC REE: What is your whole total for that department?

THE WITNESS: There is 50 total on this roll as of August 9th, that is for the men of the die and tool department.

Q (By Mr. Howard) That is in that corner of the building which I am speaking of as the machine shop?

A Yes sir, in the die and tool shop.

Q Will you name, to the best of your recollection and knowledge, the various types of machines, such as planers, lathes, drill presses, and such as that, which is in this particular shop?

A Yes, I think I can, I can almost give you all of them. We have four planers, we have two radial drills, we have two single drills there, and we have another little one over to the right, that makes three. Those radial drills, rather, one of them is used on production entirely, that is on the castings. We have a turret lathe, we have a boring mill, we have two shapers, we have another old machine there that we do not use, we have never turned it. We have a saw filing or dowel machine, it is called, we got, I think, a small lathe, and another intermediate lathe, and a large lathe, and then we have a machine for making, we make all of our drop forgings, and we have a die sealing machine.

Q You have a milling machine for cutting gears?

[98] A Most of our gears are sent out.

Q You cut some of your gears, however?

A We do in extreme cases, but as a rule, we find we can send them out better.

Q Well, do you have a milling machine in this shop?

A Yes, we have a milling machine.

Q Now, these employees in this particular shop, their duties is confined to this particular shop practically all of the time?

A Yes.

• • • •

Q Isn't it a fact that these maintenance men or millwrights, as you term them in this particular plant, whenever they see [99] some particular machine break down, and some parts has to be repaired, they are taken to the machine shop, if there is something that has to have some machine work done it?

A Oh, yes, they are usually taken to the machine shop to be machined.

Q In other words, that is what this particular shop is for?

A Primarily, yes, with the exception of the dies and tools.

Q Well, the dies is machined in there also?

A It is a combination department and it is just called the die and tool department.

Q In your payroll you call it the die and tool department?

A Yes.

Q But it takes in this machine shop?

A Yes.

Q In other words, ordinarily what we call in plants machine shops?

A Yes, but it is not put there primarily for maintenance, it is primarily put there for making dies and tools.

Q Well, in the making of dies and tools that goes on these punching machines and stamping machines, and they are used in production?

A That is right.

Q In other words, it is to machine these dies?

A Yes.

Q You get them in the rough and they are planed in this shop?

[100] A Yes.

Q Now, you have a crane in that shop that don't go anywhere, but just in that separate shop, is that correct? In other words, it is for that shop?

A It is supposed to be confined to that particular locality. However, we find sometimes, when it is necessary, we have to run it to the other departments, probably at night, like when we had three hundred cars to be unloaded, and we took that crane out there and unloaded them.

Q But ordinarily?

A Ordinarily that crane is confined to that department.

* * * *

Q And then you come down to the axle, the wheel and axle shop?

A Yes.

Q I don't care to make any repetition as to what you testified to doing, but in that axle shop, in getting these castings, the wheels, you say that you get the rough core and then you have to, you have a boring mill which you use before you put this wheel on, that is correct, isn't it?

A That is right.

Q It is bored out before you put it on?

A That is right.

[101] Q Then, you have the axle and that goes through about three different operations. In other words, they are roughed down on one machine, and then they are finished as far as the heel on the second machine and

then they are put on the third machine for what is called burnishing?

A Yes.

Q In other words, this burnishing is simply that the axle revolves and instead of being cut it is rolled?

A That is right.

Q In other words, in some shops that is called rolling the axle?

A Yes.

Q And I believe in this plant it is called burnishing?

A Yes.

Q Now, do you have a wheel press in there where you press these wheels on this axle?

A Yes.

Q And you got also a tool grinder in this wheel and axle shop, isn't that correct?

A Yes, we have a wheel and tool grinder. It depends on the amount of work. At the present time, we have a tool grinder, but sometimes we do not have.

Q Mr. Sleeman, in the shop, and these labor organizations, include the machinists that we claim to represent, or the right to represent these men in this plant, in your dealings in the [102] classifications, don't you call these men machinists in this wheel and axle shop? In other words, as a common term, wouldn't you say they are machinists?

A Absolutely not, because we have taken a man right from the farm, and he is the best production man we ever had there, right from the farm and we put him on wheel boring, and he did a better job, he was a natural born wheel borer.

Q I appreciate the fact that you can put a man on there and in other crafts in that way, and I also appreciate the fact that you can take a chimpanzee and show him the operations in some of these departments, and then put him on a chain where he cannot run away, and probably he can do that, but I am speaking in gen-

eral terms, that is the general opinion, that it is machinist's work, set up in the nature of machinist's work in this wheel and axle shop.

A I wouldn't say that, I would say they are machine helpers, it is a machine helper's job. He is confined to that principally, to that class of work, and he doesn't have to be a machinist.

Q Well, would you say he is a machine helper?

A He is a machine helper.

Q Now, you have a crane in that department?

A Yes.

Q That is confined to that department?

A Yes.

[103] Q I mean ordinarily?

A It is confined to the wheel and axle and truck department, but does other work.

Q (By Trial Examiner McRee) Is that operator of that crane included in the figure you gave us of the total number of employees in that department?

A No, he comes under a different crane department.

Q In a different crane department?

A Yes.

Q And he is not carried on your payroll—

A (Interrupting) As a tool and die man, no sir.

Q I mean under the wheel, axle and truck department?

A No, he comes under the crane operators.

* * * *

[105] Q Now, these millwrights, like I said, in the language of our organization, we would term, as a millwright, a man who goes over the plant and repairs machines in that plant. In other words, we do not class them as millwrights, we class them as machinists. Now, do you make a distinction in your plant and call them millwrights, and make a separation from machinists?

A No, the millwrights are not the machinists in our plant. Those are the men who can tear down machines

and put back wheels, and take off bolts, and put them back on and line up bolts, and pour babbit on bearings and replace bearings, and tend to the whole system to see that it is properly put in. The machinist was the man at one time who used to do like you are talking about, we had machine shop men go around and do the work.

* * * *

[106] Q (By Mr. Howard) Now, in this air work that the Trial Examiner was questioning you on before, you got what is known as "A.B." valves that you put on these cars?

A Yes.

Q These airbrake men put on all the airbrake equipment?

A Yes.

Q And your cylinders and the valves, I believe you call them "A.B." valves?

A Yes.

Q Do you have a test rack in there?

A We have no test rack.

Q You have no means of testing these valves out at the plant?

A We test the air pressure to see if it will stand so much pressure on the pipe line, after we put it in. We have air [107] gauges, but we do not have a test rack. We do not need a test rack, the test rack is only used to check up the "A.B." valve itself, but they come in on new equipment to us, so it is different from the railroads.

* * * *

[108] REDIRECT EXAMINATION

Q (By Mr. Mitch) Mr. Sleeman, you testified, I believe, that there were about seventeen men on your payroll designated as electricians. I think that figure is right.

A Seventeen men?

MR. CABANISS: Electricians.

[109] THE WITNESS: Seventeen in the maintenance department as electricians. That is separate from the powerhouse operators.

Q (By Mr. Mitch) Of that seventeen how many work in this well defined area or room, as you called it, that is designated the electrical shop?

A I answered that before, I think. I answered in this way, by saying before that we did not have any number confined there; there are one or two fellows, usually, who are there and as the work piles up, and it is necessary, for instance, if we are running high on reamers, we might go into a different department and get a bunch to get them to get those reamers out and get the work going, but we do get it out of there.

Q And they are designated as machinists working in any part of the shop?

A Yes.

Q And the powerhouse is the same way?

A Yes.

Q (By Trial Examiner McRee) You say when the work piles up in the electrical department you pull the men in from the other departments, the department of electricians?

A Yes. In order to make it clear, our track, ordinarily, we have three or four men on the track, and our reamers are high frequency electric reamers, and very frequently they get out of whack, and they take them to the electrical department [110] and fix them up, and when we haven't got any reamers on the track, or the track is not running, we get the electrical men and get them down there so they can get to the reamers down there and then go on other work.

RECROSS EXAMINATION

Q (By Mr. May) You have a well defined system of apprentices, in other words, if a man is hired in your

plant as an electrician, he don't have to serve as an apprentice?

A No, as a rule, our operations have been so up and down that by the time we get an apprentice where we can use him, why, we go down, and we have to lay off the apprentice and keep the good men, and so, that is the reason we have been trying this co-op student system. Of course, it is a little better work in a way.

Q Let us assume that you needed another man to do electrical work, and he was designated as an electrician, a man who does that type of work, where would you have to go to get him?

A Where would I get him?

Q Yes, where would you find him?

A Well, we usually have a number of applications on file for electricians and machinists, and we just naturally go to our employment file and find one.

Q Do you sometimes hire, from another portion of your plant, a man who was put on that type of work?

A We would, if we had a fellow come to us and tell us he [111] wanted to be an electrician, we have had men to come to us and say they would like to do it, and we try him out and sometimes he fails and sometimes he does not.

Q I assume you use the same general plan in your employment, in getting men, as described for the machinists?

A That is right, yes.

Q You said that if a person employed in your plant, in some other department, rather than the electrical department, made an application to work as an electrician, that you would give him that employment, but I presume you naturally make some investigation as to whether that man was capable to perform the electrical work, wouldn't you, or would you consider him different than an electrician?

A When a man applies to us for a job as an electrician, he would naturally make an application, and if we were going to hire him we would take the information where he worked, where he worked before, and check it up to see if the man can do the work. That is the natural thing. But, that does not prove true in all of our occupations. We have had men who we have not had the time to check up, we put them up there and found out that they couldn't do it.

Q Also it is true, in hiring new workers to be placed in the electrical department as electricians, you do make an electrician determine their qualifications to do the work desired?

[112] A As a rule, yes.

Q Is there any such thing as a probationary period for employees in the skilled crafts, or the skilled work at your plant, to determine whether that man is capable of performing the work desired of him?

A We have not had any probationary period other than, very frequently, if we are doubtful that the man can perform the work, we will give him a trial to see if he can do all right, and if he cannot, why, we usually tell him that we gave him a chance on it. We don't know whether he can do it or not.

Q But, you are of the opinion, I trust, that you cannot just take and pick up anyone and put them out to perform electrical work?

A Electrical welding?

Q Electrical work.

A Well, you mean—will you tell me what electrical work you mean?

Q I mean in this specific instance in your plant, to do the work in your plant?

A And electrical welding?

Q Yes, I will take the electrical welding.

A Well, I think it would be sometimes dangerous to put anybody out there into our powerhouse. As a matter

of fact, I am afraid of electricity and I wouldn't touch it myself, I keep away from it, and when I do it myself I don't ask the [113] other fellow to do what I will not do. We like to know what experience a man has had, and what he has been doing, instead of just shooting up the works.

* * * *

[128] J. L. GIGLIO

a witness called by and on behalf of the Federal Labor Union, Intervenor, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Trial Examiner McRee) Where do you live, Mr. Giglio?

A 1012 Fulton Avenue, Birmingham.

Q What is your business or occupation?

A I am an organizer for the American Federation of Labor.

Q A general organizer for the AF of L?

A Yes sir.

Q And you are appearing in this hearing representing what organization?

A The Federal Organization of the American Federation of Labor.

Q Now, is that one Federal Labor Union, or, explain to us what that organization is?

A The Federal Organization in this case is an organization that we take in all of the industrial workers with exceptions. Let me put it this way: The American Federation of Labor is a craft organization. We go in as Federal Organizations and organize these men and then the different crafts comes in and takes their prorata share of the men, and deal with their organizations, such as the machinists and the millwrights, and [129] on down the line there, leaving me the rest of the men,

black and white, common laborers, and mechanics that is not stipulated in the Electrical Workers or the Machinists Organization.

* * * *

[130] Q At the present time you are claiming to represent all the employees of the Pullman Company, exclusive of those who are represented by the International Association of Machinists, those represented by the International Brotherhood of Electrical Workers, and the supervisory employees, including foremen, assistant foremen, leaders and superintendents?

A Well, I don't know about the leaders. If the leaders have the power to hire and fire, of course, we could exclude them, but if they cannot hire and fire, but just merely got the title there as foremen, then, we do take them.

* * * *

[132] CROSS EXAMINATION

* * * *

Q (By Mr. Beddow) Suppose you went to Mr. Sleeman's plant and the machinists [133] were not there, who would you take, who would take them in the Machinists Union?

A I would take them in if they wanted to join.

Q In the Machinists Union?

A No sir, I would take them in the Federal Union and let the Machinists Union take them from the Federal Union.

Q Suppose, however, you had in that plant a number of negro workers who were helpers to machinists out there, would you take them in?

A I would take them in the Federal Union, yes.

Q Would they be eligible to join the Machinists Union when they came after them?

A I cannot answer for the Machinists Union.

Q You don't know whether they would or not?

A There is, the Machinists have a provision in the constitution to take care of helpers.

Q Do they have a provision to take care of negro helpers?

A Yes.

TRIAL EXAMINER MC REE: I don't know that that line of questioning adds anything to this. There has been no testimony that there are any negro helpers involved in the machine shop.

MR. BEDDOW: There are only two and it is my information that they cannot belong—

MR. MAY: Mr. Examiner, are we going into a race question [134] here, or are we talking about the facts in the case?

TRIAL EXAMINER MC REE: I made my statement. I don't think that this line of questioning has anything to do with this witness' testimony at all.

Q (By Mr. Beddow) All right, you say you let them come in and get them if they wanted them, is that right?

A They got to have jurisdiction over them. They don't get what they want.

Q And you don't know whether they would take that jurisdiction?

A Under their constitution they would have it.

* * * *

[143] TRIAL EXAMINER MC REE: One thing I want to get clear in the record, it may not be clear on the record, and I want a statement from the representative of the Machinists as to its contention as to the appropriate bargaining unit. He had a preliminary statement this morning, but there has been a great deal of testimony about the work of the employees in these departments, and I want to clear it up as much as possible. Are you prepared to make such a statement at this time, Mr. Howard?

MR. HOWARD: At this time I want to offer the constitution of the Grand Lodge, District and Local Lodges, International Association of Machinists, and Page V, and I want to refer to the heading there "Jurisdiction of the International Association of Machinists", and introduce that, and come on down to Lines 28 and 29, "Classification of Work Included".

Also Page VI, VII, VIII, IX and X of the Constitution.

TRIAL EXAMINER MC REE: You are offering a copy of this Constitution as an exhibit?

MR. HOWARD: An exhibit on the classification of the work covering the men that we claim to represent over at the [144] Pullman-Standard Car Manufacturing Company at Bessemer, inasmuch as we use, usually use the term, in calling them machinists, that it includes machinists, apprentices, helpers, welders, both electric and oxy-acetylene, and millwrights.

TRIAL EXAMINER MC REE: To clear the record, then, you are offering now a printed pamphlet entitled: "Constitution of the Grand Lodge, District and Local Lodges, International Association of Machinists".

Is there any objection to the introduction of this exhibit?

MR. MITCH: Is that offered for the purpose of defining what unit they are contending for now, or the jurisdiction of their organization?

TRIAL EXAMINER MC REE: Mr. Howard, you are offering this to show what jurisdiction your organization has, and what employees are eligible for membership in your organization?

MR. HOWARD: That is right. In other words, we term millwrights, we claim, are machinists. Ordinarily the term "Machinist" covers millwrights.

TRIAL EXAMINER MC REE: Wait a minute. This exhibit is received as I.N. Exhibit 1.

(The document above referred to was marked I.N. Exhibit No. 1 and received in evidence.)

TRIAL EXAMINER MC REE: Mr. Howard, you might be a little more specific than you were this morning, after hearing the [145] testimony of Mr. Sleeman, as to which employees or classification of employees you desire to be included in the appropriate unit.

MR. HOWARD: I thought I covered it just then.

TRIAL EXAMINER MC REE: Well, let me ask you—

MR. BEDDOW: Is he testifying now? If he is, I suggest he be put under oath.

TRIAL EXAMINER MC REE: No, I am asking him to make this statement at the counsel table.

Mr. Sleeman testified that they had only, I think, nineteen machinists in that tool and die or die and tool department, I have forgotten which, and there were maintenance machinists, there were handymen or helpers, there were machine operators and there were die men. Now, do you take all of those classifications in that department in?

MR. HOWARD: That is right.

TRIAL EXAMINER MC REE: In addition to those classifications I have named, they had tool room men and tool room helpers and we had cranemen and crane operators' helpers.

MR. HOWARD: There were more than two in the tool room, as I recall it.

TRIAL EXAMINER MC REE: I mean one on each shift, I think was the testimony. Do you take in all of the employees Mr. Sleeman testified about as being in this tool and die room?

MR. HOWARD: That is correct.

[146] TRIAL EXAMINER MC REE: Does that include the man who is described as the templete man?

MR. HOWARD: No, we don't take the template.

TRIAL EXAMINER MC REE: You do take in the tool room men and the crane operators in that part of the plan?

MR. HOWARD: The crane operators and the tool and die and machine shop. I believe we identified them, is that correct?

TRIAL EXAMINER MC REE: That is correct.

MR. HOWARD: And in the wheel and axle, we claim them, but we claim nobody in the forge shop at all.

TRIAL EXAMINER MC REE: You claim all of the employees in the wheel and axle, exclusive of the supervisory employees?

MR. HOWARD: Yes, according to what was testified this morning.

TRIAL EXAMINER MC REE: That will exclude the foreman and the assistant foreman?

MR. HOWARD: Yes sir.

TRIAL EXAMINER MC REE: Now, do you ask for the crane operators in the wheel and axle department?

MR. HOWARD: That is right.

TRIAL EXAMINER MC REE: Now, you are asking for all of the employees that have been referred to here as millwrights?

MR. HOWARD: That is right, and the airbrake men.

TRIAL EXAMINER MC REE: You are asking for all of the [147] employees in the airbrake department, and when I say all of the employees in those departments, I mean exclusive of supervisory.

MR. HOWARD: That is the understanding.

TRIAL EXAMINER MC REE: And you also exclude the clerical employees?

MR. HOWARD: That is right, we exclude the clerical.

TRIAL EXAMINER MC REE: And you are also asking for all of the welders, both production welders and maintenance welders?

MR. HOWARD: That is right.

TRIAL EXAMINER MC REE: Now, do you think that defines your unit?

MR. HOWARD: I think so.

TRIAL EXAMINER MC REE: Anything else?

MR. BEDDOW: He said he took all of the hookers and the crane operators and whatnot.

MR. HOWARD: I did not say hookers.

TRIAL EXAMINER MC REE: He did not claim the hookers.

MR. HOWARD: I didn't claim the hookers, no.

TRIAL EXAMINER MC REE: That would be in both the tool and die and the wheel and axle.

MR. HOWARD: I don't claim the hookers anywhere.

TRIAL EXAMINER MC REE: Neither one of the hookers?

MR. HOWARD: That is right.

TRIAL EXAMINER MC REE: Anything else by any of the [148] parties?

MR. BEDDOW: Did you say you claim the cranemen in the axle department, too?

TRIAL EXAMINER MC REE: So I understood. Is that correct?

MR. HOWARD: Yes, just in the wheel and axle and the tool and die and machine shop, that is all.

MR. BEDDOW: Let me ask one thing, and I want this for the record and no other reason. Part of those men, cranemen out there are negro workers, and even though they are in your department, do you claim those negro cranemen and negro hookers, or whatnot?

MR. HOWARD: We claim them in that department.

MR. BEDDOW: You claim them, even though they are colored?

MR. HOWARD: Yes.

TRIAL EXAMINER MC REE: But not the hookers, you do not claim the hookers in any department?

MR. HOWARD: That is right.

TRIAL EXAMINER MC REE: That was my understanding.

* * * *

PLAINTIFFS' EXHIBIT 14

IN THE MATTER OF
PULLMAN-STANDARD CAR MANUFACTURING COMPANY
AND STEEL WORKERS ORGANIZING COMMITTEE

Case No. R-2952.—Decided September 12, 1941

Jurisdiction: railroad car manufacturing industry.

Investigation and Certification of Representatives: existence of question: refusal by Company to grant exclusive recognition to unions involved; elections necessary.

Units Appropriate for Collective Bargaining: single or separate units comprising: (1) all electrical employees in maintenance department, and powerhouse and substation operators, excluding foremen, leaders, and clerical employees; (2) all machinists, apprentices and helpers, employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handymen, and cranemen, millwrights, production and maintenance welders, employees in wheel, axle and truck shop, except crane hookers, and employees in air-brake department excluding foremen, leaders, and clerical employees; and (3) all production and maintenance employees including watchmen, and plant protection employees but excluding foremen, leaders and clerical employees; determination of, dependent upon elections.

Mr. Jelks H. Cabaniss, of Birmingham, Ala., for the Company.

Mr. William E. Mitch and *Mr. Noel R. Beddow*, of Birmingham, Ala., for the S. W. O. C.

Mr. J. R. May, of Montgomery, Ala., for the I.B.E.W.

Mr. J. H. Howard, of Washington, D.C., and *Mr. J. D. Baumgardner*, of Birmingham, Ala., for the I. A. M.

Mr. J. L. Giglio, of Birmingham, Ala., for the Federal Labor Union.

Mr. Harry Cooper, of counsel to the Board.

DECISION
AND
DIRECTION OF ELECTIONS

STATEMENT OF THE CASE

On August 1, 1941, Steel Workers Organizing Committee, herein called the S. W. O. C., filed with the Regional Director for the Tenth Region (Atlanta, Georgia) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9(c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On August 20, 1941, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9(c) of the Act, and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 2, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice.

On August 21, 1941, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, the S. W. O. C., and the following labor organizations claiming to represent employees directly affected by the investigation: Federal Labor Union, affiliated with the American Federation of Labor, herein

called the Federal Labor Union; International Association of Machinists, affiliated with the American Federation of Labor, herein called the I. A. M.; and International Brotherhood of Electrical Workers, affiliated with the American Federation of Labor, herein called the I. B. E. W. Pursuant to notice, a hearing was held on August 28, 1941, at Birmingham, Alabama, before John C. McRee, the Trial Examiner duly designated by the Chief Trial Examiner. At the beginning of the hearing, the Federal Labor Union, the I. A. M., and the I. B. E. W. presented motions to intervene which were granted by the Trial Examiner. The Company, the S. W. O. C., the Federal Labor Union, the I. A. M., and the I. B. E. W. were represented by counsel or official representatives and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the course of the hearing the Trial Examiner made various rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company is a Delaware corporation operating a plant at Bessemer, Alabama, where it manufactures railroad cars. All manufactured cars are sold to railroads engaged in interstate commerce. The Company admits, for the purposes of this proceeding, that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATIONS INVOLVED

Steel Workers Organizing Committee is a labor organization affiliated with the Congress of Industrial Organizations, admitting employees of the Company to membership.

Federal Labor Union, International Association of Machinists, and International Brotherhood of Electrical Workers, are labor organizations affiliated with the American Federation of Labor, admitting employees of the Company to membership.

III. THE QUESTION CONCERNING REPRESENTATION

In July 1941, the S. W. O. C. requested of the Company recognition as the exclusive bargaining representative of its employees. The Company failed to recognize S. W. O. C. as such representative. In August, the I. B. E. W., the I. A. M., and the Federal Labor Union each sought exclusive recognition by the respondent as bargaining representatives of certain of its employees. It does not appear that the Company granted such recognition to any of these organizations. In July or August, the Company informed the Regional Director of its desire that the Board decide the question of representation. From a statement of the Trial Examiner made at the hearing, it appears that each of the labor organizations here involved represents a substantial number of the Company's employees in the unit claimed by each to be appropriate for purposes of collective bargaining.[1]

[1] The S. W. O. C. submitted to the Trial Examiner 1,053 authorization and membership cards. The Trial Examiner examined them and stated that 1,039 cards appeared to bear genuine original signatures, that 880 cards were dated between April 1 and August 14, 1941, 95 between April 1 and December 30, 1940, and that the remainder were undated. The Trial Examiner selected 100 cards at random, checked the signatures thereon against the pay roll for the week ending August 9, 1941, and found 92 to be the names of

We find that a question has arisen concerning the representation of employees of the Company.

IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

---

persons appearing on said pay roll. There are about 1,168 employees in the unit claimed by the S. W. O. C. to be appropriate.

The I.B.E.W. submitted to the Trial Examiner a membership dues receipts book and a membership application receipts book, both books containing the receipts of a total of 17 persons who were alleged to be employees of the Company. All these receipts were dated during August 1941. The Trial Examiner found that of the 17 names listed on these receipts, 16 appeared on the August 9 pay roll. There are 21 employees in the unit claimed by the I.B.E.W. to be appropriate.

The I. A. M. submitted to the Trial Examiner 137 authorization cards dated during August 1941. The Trial Examiner stated that all of the cards appeared to bear genuine original signatures, and that, among 30 cards selected at random, 26 bore the names of persons appearing on the August 9 pay roll. There are about 135 employees in the unit claimed by the I. A. M. to be appropriate, exclusive of millwrights, whose number the record does not disclose.

The Federal Labor Union submitted to the Trial Examiner 248 authorization and membership cards, of which 236 appeared to the Trial Examiner to bear genuine, original signatures, and 221 of the 236 were dated during August 1941. The Trial Examiner selected 60 cards at random and found that 49 bore the names of persons listed on the August 9 pay roll. There are about 1,000 employees in the unit claimed by the Federal Labor Union to be appropriate.

V. THE APPROPRIATE UNIT

The S. W. O. C. contends that production and maintenance employees, excluding foremen, superintendents, and clerical employees, constitute a unit appropriate for the purposes of collective bargaining. The I. B. E. W. urges that a separate unit of all electrical employees in the maintenance department, and power-house and substation operators, excluding supervisory and clerical employees, is appropriate. The I. A. M. claims that a separate unit composed of machinists, apprentices and helpers, employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handymen, and cranemen, millwrights, production and maintenance welders, employees in the wheel, axle, and truck shop, except crane hookers, and employees in the air-brake department, excluding from each of the foregoing groups supervisory and clerical employees, is appropriate. The Federal Labor Union asserts that all employees, including clerical employees, watchmen, and plant-protection employees, but excluding employees in the units claimed by the I. A. M. and the I. B. E. W., and supervisory employees with authority to hire and discharge, comprise an appropriate unit. The Company takes no position with respect to the appropriate unit.

The evidence indicates that many of the employees in the separate units urged by the I. B. E. W. and the I. A. M. are skilled employees, and all of such employees appear to come under the craft jurisdictions of these two unions. On the other hand, evidence was introduced to show that the manufacture of railroad freight cars at the Company's plant is an integrated production process, and that an industrial unit, including the employees claimed by the I. A. M. and the I. B. E. W., is appropriate. So far as the record shows, there has been no history of collective bargaining either by the craft or in-

dustrial unions.[2] Under the circumstances herein presented, we find that the employees in the units claimed by the I. B. E. W. and the I. A. M. could function either as separate units or as part of a single industrial unit. Accordingly, we shall direct that elections be held, (1) among the employees, with the exclusions specified below, claimed by the I. B. E. W. to constitute an appropriate unit, to determine whether they wish to be represented by the I. B. E. W., by the S. W. O. C., or by neither of these organizations; (2) among the employees, with the exclusions specified below, claimed by the I. A. M. to constitute an appropriate unit, to determine whether they wish to be represented by the I. A. M., by the S. W. O. C., or by neither of these organizations. On the results of these elections will depend the appropriate unit. If the employees in either of these two groups select a bargaining representative other than the representative selected by the employees in the plant-wide industrial unit, they will constitute a separate and distinct appropriate unit. If they choose the same representative as the employees in the plant-wide industrial unit, they will be merged into a single unit with such employees.[3]

Supervisory employees. Supervisory employees at the Company's plant, consisting of foremen and leaders, have authority to hire and discharge employees. All parties apparently desire, and since they are major supervisory employees, we shall direct, that these employees be excluded from the craft and industrial units.[4]

---

[2] The S. W. O. C. attempted to negotiate a contract with the Company in 1937 and again in 1941. However, the parties never entered into a contract and the character of the negotiations does not appear.

[3] *Matter of The Globe Machine and Stamping Co.* and *Metal Polishers Union, Local No. 3, et al.*, 3 N.L.R.B. 294.

[4] *James E. Stark Co.* and *Upholsterers' International Union of North America, Local No. 255*, 33 N.L.R.B. 1076.

Clerical employees. The S. W. O. C. desires to exclude clerical employees from the appropriate unit. The I. B. E. W. and the I. A. M. also seek to exclude clerical employees from the unit each seeks as appropriate. The Federal Labor Union, on the other hand, requests the inclusion of clerical employees in the unit of employees it claims as appropriate. The Federal Labor Union, however, has not specified which employees it refers to as clerical, or introduced any evidence regarding the duties of the clerical employees it desires included in the unit. The plant manager included in his pay-roll list of "clerical" employees all employees in engineering, pay-roll, timekeeping, and accounting departments. Apparently all these employees work in the Company's general office. They are salaried employees. The evidence does not disclose whether there are any clerical employees in the plant. Under these circumstances, and since the interests of the employees in the engineering, pay-roll, timekeeping, and accounting departments are distinct from those of employees in a unit of production employees, we shall exclude all clerical employees from the units herein alleged to be appropriate.

Watchmen and plant-protection employees. The Federal Labor Union desires the inclusion of these employees in the industrial unit. The S. W. O. C. has not expressed its position with regard to these employees. We shall include the watchmen and plant-protection employees in the industrial unit.[5]

We find that all production and maintenance employees, including watchmen and plant-protection employees, but excluding superintendents, foremen, leaders, and clerical employees, may properly constitute a unit appropriate for the purposes of collective bargaining which would insure to the employees of the Company

[5] *Matter of The Quaker Oats Company* and *United Cereal Workers Local Industrial Union, No. 1105*, 32 N.L.R.B. 312.

the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act. As indicated above, the employees in the units claimed by the I. A. M. and the I. B. E. W. may or may not be included within such unit, depending on the results of the elections we shall order. We shall, therefore, make no final determination of the appropriate unit or units pending the elections to be conducted among the employees in the craft units.

VI. THE DETERMINATION OF REPRESENTATIVES

We have heretofore decided that separate elections will be held to determine the collective bargaining representatives for the employees in the craft units. We find that the question concerning representation of the employees in the industrial unit can best be resolved by means of an election by secret ballot.

The parties stipulated that the pay roll for the week ending August 9, 1941, would be satisfactory for the purpose of determining eligibility to vote. We shall give effect to the desires of the parties in this respect and shall accordingly direct that the employees of the Company eligible to vote in the elections shall be those who were employed during the pay-roll period ending August 9, 1941, subject to such limitations and additions as are set forth in the Direction of Elections herein.

At the hearing the labor organizations requested that their names appear on the ballot as follows: Steel Workers Organizing Committee, Local No. 1466; Federal Labor Union, affiliated with the American Federation of Labor; International Association of Machinists, Local No. 359; and International Brotherhood of Electrical Workers, Local No. 287. These requests are hereby granted.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSION OF LAW

A question affecting commerce has arisen concerning the representation of employees of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, within the meaning of Section 9(c) and Section 2 (6) and (7) of the National Labor Relations Act.

DIRECTION OF ELECTIONS

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9(c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

DIRECTED that, as part of the investigation authorized by the Board to ascertain representatives for the purposes of collective bargaining with Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, elections by secret ballot shall be conducted as soon as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Tenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations:

1. Among all electrical employees in the maintenance department, and power-house and sub-station operators of the Company, who were employed during the pay-roll period ending August 9, 1941, including employees who did not work during such pay-roll period because they were ill or on vacation or in the active military service or training of the United States, or temporarily laid off, but excluding foremen, leaders, clerical employees, and employees who have since quit or been discharged for

cause, to determine whether they desire to be represented by Steel Workers Organizing Committee, Local No. 1466 or by International Brotherhood of Electrical Workers, Local No. 287, for the purposes of collective bargaining, or by neither; and

2. Among all machinists, apprentices and helpers, employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handymen, and cranemen, millwrights, production and maintenance welders, employees in wheel, axle, and truck shop, except crane hookers, and employees in air-brake department, who were employed by the Company during the pay-roll period ending August 9, 1941, including employees who did not work during such pay-roll period because they were ill or on vacation or in the active military service or training of the United States, or temporarily laid off, but excluding foremen, leaders, and clerical employees, and employees who have since quit or been discharged for cause, to determine whether they desire to be represented by Steel Workers Organizing Committee, Local No. 1466, or by International Association of Machinists, Local No. 359, for purposes of collective bargaining, or by neither; and

3. Among all production and maintenance employees of the Company who were employed during the pay-roll period ending August 9, 1941, including watchmen, plant-protection employees, employees who did not work during such pay-roll period because they were ill or on vacation or in the active military service or training of the United States, or temporarily laid off, but excluding superintendents, foremen, leaders, clerical employees, employees in groups 1 and 2 above, and employees who have since quit or been discharged for cause, to determine whether they desire to be represented by Steel Workers Organizing Committee, Local No. 1466 or by Federal Labor Union, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither.

PLAINTIFFS' EXHIBIT 15

IN THE MATTER OF PULLMAN-STANDARD CAR MANUFACTURING COMPANY AND STEEL WORKERS ORGANIZING COMMITTEE

Case No. R-2952

SUPPLEMENTAL DECISION

AND

CERTIFICATION OF REPRESENTATIVES

November 19, 1941

On September 12, 1941, the National Labor Relations Board, herein called the Board, issued its Decision and Direction of Elections in the above-entitled proceeding.[1] Pursuant to said Direction of Elections, elections by secret ballot were conducted on October 7, 1941, under the direction and supervision of the Regional Director for the Tenth Region (Atlanta, Georgia). On October 16, 1941, the Regional Director, acting pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, issued an Election Report, copies of which were duly served upon the parties. No objections to the conduct of the ballot or to the Election Report were filed by any of the parties.

As to the balloting and the results thereof, the Regional Director reported as follows:

Group No. 1

1. Total number eligible	22
2. Total ballots cast	18
3. Total number of ballots cast for Steel Workers Organizing Committee, Local No. 1466	4
4. Total number of ballots cast for International Brotherhood of Electrical Workers, Local No. 287	13

[1] 35 N.L.R.B., No. 78.

5. Total number of votes cast for neither organization	1
6. Total number of challenged ballots	0
7. Total number of void ballots	0
8. Total number of blank ballots	0

Group No. 2

1. Total number eligible	163
2. Total ballots cast	151
3. Total number of ballots cast for Steel Workers Organizing Committee, Local No. 1466	18
4. Total number of ballots cast for International Association of Machinists, Local No. 359	127
5. Total number of votes cast for neither organization	5
6. Total number of challenged ballots	1
7. Total number of void ballots	0
8. Total number of blank ballots	0

Group No. 3

1. Total number eligible	987
2. Total ballots cast	904
3. Total number of ballots cast for Steel Workers Organizing Committee, Local No. 1466	736
4. Total number of ballots cast for Federal Labor Union, Affiliated with the American Federation of Labor	111
5. Total number of votes cast for neither organization	24
6. Total number of challenged ballots	28
7. Total number of void ballots	4
8. Total number of blank ballots	1

Since the number of challenged ballots cannot affect the results of the election, the Regional Director made no report or recommendation regarding said challenges, and we find it unnecessary to make any determination with respect thereto.

In the Decision and Direction of Elections previously referred to the Board stated:

> . . . we shall direct that elections be held, (1) among the employees, with the exclusions specified below, claimed by the I. B. E. W. to constitute an appropriate unit, to determine whether they wish to be represented by the I. B. E. W., by the S. W. O. C.,

or by neither of these organizations; (2) among the employees, with the exclusion specified below, claimed by the I. A. M. to constitute an appropriate unit, to determine whether they wish to be represented by the I. A. M., by the S. W. O. C., or by neither of these organizations. On the results of these elections will depend the appropriate unit. If the employees in either of these two groups select a bargaining representative other than the representative selected by the employees in the plant-wide industrial unit, they will constitute a separate and distinct appropriate unit. If they choose the same representative as the employees in the plant-wide industrial unit, they will be merged into a single unit with such employees.

Upon the basis of the entire record in the case, the Board makes the following:

Supplemental Findings of Fact

We find that all electrical employees in the maintenance department, and powerhouse and substation operators, of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, excluding foremen, leaders, and clerical employees, constitute a unit appropriate for the purposes of collective bargaining.

We find that all machinists, apprentices and helpers, employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handymen, and cranemen, millwrights, production and maintenance welders, employees in wheel, axle, and truck shop, except crane hookers, and employees in air-brake department,[2] of Pullman-Standard Car Manufacturing

[2] It is to be noted that the Board intended in its Decision and Direction of Elections to include employees in air-brake department in the unit sought by the I. A. M.

Company, Bessemer, Alabama, excluding foremen, leaders, and clerical employees, constitute a unit appropriate for the purposes of collective bargaining.

We find that all production and maintenance employees of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, including watchmen and plant protection employees, but excluding superintendents, foremen, leaders, clerical employees, and employees enumerated above in the last two preceding paragraphs, constitute a unit appropriate for the purposes of collective bargaining.

We find that the above units will insure to the employees of the Company the full benefit of their right to self-organization and to collective bargaining, and otherwise will effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Supplemental Conclusions of Law

1. All electrical employees in the maintenance department, and powerhouse and substation operators, of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, excluding foremen, leaders, and clerical employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

2. All machinists, apprentices and helpers, employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handymen, cranemen, millwrights, production and maintenance welders, employees in wheel, axle, and truck shop, except crane hookers, and employees in air-brake department, of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, excluding foremen, leaders, and clerical em-

ployees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the National Labor Relations Act.

3. All production and maintenance employees of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, including watchmen and plant protection employees, but excluding superintendents, foremen, leaders, clerical employees, and employees in group 1 and 2 above, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the National Labor Relations Act.

CERTIFICATION OF REPRESENTATIVES

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9(c) of the National Labor Relations Act, 49 Stat. 449, and pursuant to Article III, Sections 8 and 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended,

IT IS HEREBY CERTIFIED that International Brotherhood of Electrical Workers, Local No. 287, has been designated and selected by a majority of all electrical employees in the maintenance department, and powerhouse and substation operators, of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, excluding foremen, leaders, and clerical employees, as their representative for the purposes of collective bargaining, and that pursuant to Section 9(a) of the National Labor Relations Act, International Brotherhood of Electrical Workers, Local No. 287, is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

IT IS HEREBY CERTIFIED that International Association of Machinists, Local No. 359, has been designated and

selected by a majority of all machinists, apprentices and helpers, employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handymen, and cranemen, millwrights, production and maintenance welders, employees in wheel, axle, and truck shop, except crane hookers, and employees in air-brake department, of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, excluding foremen, leaders, and clerical employees, as their representative for the purposes of collective bargaining, and that pursuant to Section 9(a) of the National Labor Relations Act, International Association of Machinists, Local No. 359, is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

IT IS HEREBY CERTIFIED that Steel Workers Organizing Committee, Local No. 1466, has been designated and selected by a majority of all production and maintenance employees of Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, including watchmen and plant protection employees, but excluding superintendents, foremen, leaders, clerical employees, and employees enumerated above in the last two preceding paragraphs, as their representatives for the purposes of collective bargaining, and that pursuant to Section 9(a) of the National Labor Relations Act, Steel Workers Organizing Committee, Local No. 1466, is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

MR. GERARD D. REILLY took no part in the consideration of the above Supplemental Decision and Certification of Representatives.

PLAINTIFFS' EXHIBIT 17

AGREEMENT

THIS AGREEMENT made and entered into this 7th day of April, 1942, between Pullman-Standard Car Manufacturing Company, hereinafter referred to as the "Company", for its plant located in the City of Bessemer, State of Alabama, and the International Association of Machinists, Lodge No. 359, affiliated with the American Federation of Labor, hereinafter referred to as the "Association", as the exclusive representative and bargaining agent of all employees of the Company as defined and set forth in the second paragraph of the National Labor Relations Board, Tenth Region, certification, Case No. R-2952, dated November 19, 1941, as supplemented or clarified by letter of the respective unions to the Company dated December 19, 1941:

* * * *

11. SENIORITY. Seniority of employees covered by this Agreement shall be confined to the department employed in each of the following departments:

Tool and Die Shop
Wheel and Axle Shop
Air-Brake Department
Welders
Millwrights.

Seniority starts from the day of employment. When it becomes necessary to reduce expenses, the force shall be reduced.

Nothing herein shall affect the application or definition of the term "length of service" or a similar term as contained in the Company's group insurance, contributory retirement income, pension, and vacation plan for hourly and piece-work employees as amended July 14, 1941.

[Attachment to Plaintiffs' Exhibit 17]

Notice will be given to the men affected before reduction is made, five days in advance, unless conditions beyond the company's control prevent, and lists will be furnished the Shop Committee.

The last man employed shall be the first man laid off, except that due to nature of the work on production tracks the present practice in the welders and air-brake departments will continue, in that the men affected will take lay off without regard to seniority, provided, however, that in case of permanent lay-off, seniority will govern.

In the restoration of forces, senior laid off men will be given preference of re-employment, if available within a reasonable time, and shall be returned to their former positions if practicable.

A copy of the seniority list will be made available at least twice a year to the Shop Committee and notice posted that copy is available in the employment office to the employees listed.

New employees are on probation for three months, during which time they may be laid off or discharged as exclusively determined by the Company.

* * * *

IN WITNESS WHEREOF, the Company and the Association have each caused these presents to be executed in their respective names by their proper officers thereunto duly authorized.

PULLMAN-STANDARD CAR MANUFACTURING COMPANY (BESSEMER PLANT)
By W. C. Sleeman, Works Manager.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 359,

By H. A. Schrader, J. H. Howard,
Grand Lodge Representatives.

A. H. Raines,
Committeeman, Lodge 359.

[Attachment to Plaintiffs' Exhibit 17]

Birmingham, Alabama
December 19, 1941.

Pullman-Standard Car Manufacturing Company,
Birmingham, Alabama.

Gentlemen:

You are familiar with the fact that the classification of employees set out in the Board's Decision and Direction of Elections, dated September 12 and November 19, 1941, is in some respects difficult of interpretation and in minor respects inadvertent in the classification of employees as has been recognized both by the Company and by the respective bargaining agencies. The matter having reached the Board, suggestion has been received that the parties interested agree among themselves upon a correction of the matter. Conference was accordingly held on December 18, at the request of the Board, resulting in the following agreement between representatives of the Steel Workers Organizing Committee and the International Association of Machinists, as to the matter:

The following classifications are the classifications to be considered as included in paragraph 2, page 6, group 2, of the Board's Decision and Order: All machinists, machinists apprentices, machinists helpers; employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handy-men and cranemen, but excluding laborers and hook-ons; employees classified as millwrights, production and maintenance burners, welders, tackers, burners and welder helpers; employees in the wheel and axle department except crane hookers, wheel rollers and laborers; air brake production employees classified as pipe fitters, pipe fitter helpers, and air brake testers; employees in steel erection department classified as toolroom men and toolroom helpers of Pullman-Standard Car Manufacturing Company,

Bessemer, Alabama, excluding foremen, leaders and clerical employees. Employees of the truck shop are properly included in group 3.

We accordingly request that the company acquiesce in the above agreement.

Yours very truly,

STEELWORKERS ORGANIZING COMMITTEE,

By /s/ W. H. Crawford,
Field Representative.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
LODGE 359,

By /s/ J. D. Baumgardner,
Business Representative.

ACCEPTED: as noted below.

PULLMAN-STANDARD CAR MANUFACTURING COMPANY
(BESSEMER PLANT)

By /s/ W. C. Sleeman,
Its Manager of Works

NOTE: Assuming that the foregoing is satisfactory to the Board, and subject to Board orders.

PLAINTIFFS' EXHIBIT 18

AGREEMENT

THIS AGREEMENT made and entered into this June 13, 1944 between Pullman-Standard Car Manufacturing Company, hereinafter referred to as the "Company", for its plant located in the City of Bessmer, State of Alabama, and the International Association of Machinists, Lodge No. 359, affiliated with the American Federation of Labor, hereinafter referred to as the "Association", as the exclusive representative and bargaining agent of all employees of the Company as defined and set forth in the second paragraph of the National Labor Relations Board, Tenth Region, certification, case No. R-2952, dated November 19, 1941, as supplemented or clarified by letter of the respective unions to the Company dated December 19, 1941:

* * * *

11. SENIORITY.

Seniority of employees covered by this agreement shall be confined to the department employed in each of the following departments:

Tool and Die Shop
Wheel and Axle Shop
Air-Brake Department
Welders
Millwrights.

Seniority starts from the day of employment. When it becomes necessary to reduce expenses, the force shall be reduced.

Nothing herein shall affect the application or definition of the term "length of service" or a similar term as contained in the Company's group insurance, contributory retirement income, pension, and vacation plan for

hourly and piece-work employees as amended July 14, 1941 and extended to cover the year 1944.

Notice will be given to the men affected before reduction is made, five days in advance, unless conditions beyond the company's control prevent, and lists will be furnished the Shop Committee.

The last man employed shall be the first laid off, except that due to nature of the work on production tracks the present practice in the welders and air-brake departments will continue, in that the men affected will take lay off without regard to seniority, provided, however, that in case of permanent lay-off seniority will govern.

In the restoration of forces, senior laid off men will be given preference of re-employment, if available within a reasonable time, and shall be returned to their former positions if practicable.

A copy of the seniority list will be made available at least twice a year to the Shop Committee and notice posted that copy is available in the employment office to the employees listed.

New employees are on probation for three months, during which time they may be laid off or discharged as exclusively determined by the Company.

• • • •

SUPPLEMENT

[Attached to Plaintiffs' Exhibit 18]

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case No. 10-R-1212

In the matter of:

PULLMAN-STANDARD CAR MANUFACTURING COMPANY, BESSEMER, ALABAMA PLANT

AND

UNITED STEELWORKERS OF AMERICA CIO

It is hereby agreed by and between United Steelworkers of America, Local No. 1466, by R. M. Poarch and Dan R. Houston, and International Association of Machinists, Lodge No. 359, by J. C. McGlon and J. D. Bumgardner as follows:

1. All machinists, machinist apprentices, machinist helpers; employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handy-men and crane men, but excluding laborers and hook-ons; also all millwrights employed by Pullman-Standard Car Manufacturing Company, Bessemer, Alabama; excluding all foremen, leaders and clerical employees, constitute an appropriate unit within the meaning of Section 9 (c) of the National Labor Relations Act. It is further agreed that the International Association of Machinists represents the employees in such unit and that it shall be recognized as exclusive bargaining representative of the employees in such unit by the Pullman-Standard Car Manufacturing Company.

2. It is agreed that all employees classified as production and maintenance burners, welders, tackers, burner

and welder helpers; employees in the wheel and axle department; airbrake production employees classified as pipe fitters, pipe fitter helpers and airbrake testers; employees in erection department classified as toolroom men and toolroom helpers, excluding foremen, leaders and clerical employees shall be added to or included in the appropriate unit represented at the present time by the United Steelworkers of America, Local No. 1466. It is agreed that United Steelworkers of America represents the employees in such unit as thus enlarged and that the Pullman-Standard Car Manufacturing Company will recognize the United Steelworkers of America, Local No. 1466, as the exclusive bargaining representative of such employees.

This June 14, 1944.

INTERNATIONAL ASSOCIATION
OF MACHINISTS

By /s/ J. D. Baumgardner
By /s/ J. C. McGlon

UNITED STEELWORKERS OF
AMERICA CIO
LOCAL No. 1466

By /s/ R. M. Poarch
By /s/ Dan R. Houston

Witnessed by:

/s/ Paul L. Kuelthan,
Regional Atty., N. L. R. B.

Pullman-Standard Car Manufacturing Company has taken no position in the matter of selection of a bargaining representative by its employees and therefore does

not assume responsibility for the above and foregoing agreement between the respective unions heretofore certified by the National Labor Relations Board but being of the opinion that present controversy as to bargaining units is not in aid of harmonious operation of the Bessemer plant hereby acquiesces in the foregoing agreement and agrees for the duration of its existing contracts with the respective unions to recognize them, respectively, as exclusive bargaining agents for the bargaining units so defined, subject to any valid order or directive by public authority or requirement of law to the contrary.

PULLMAN-STANDARD
CAR MANUFACTURING
COMPANY

By /s/ W. C. Sleeman.

6-14-44

PLAINTIFFS' EXHIBIT 19

MEMORANDUM AGREEMENT

It is agreed this 6th day of October, 1944, between the International Association of Machinists, Lodge No. 359, affiliated with the American Federation of Labor, and the Pullman-Standard Car Manufacturing Company, Bessemer, Alabama Plant, to amend Section 8 "Vacations"; Section 10 "Reporting time"; Section 11 "Seniority; and add Section 11-A; Section 11-B; and Section 11-C:

* * * *

SECTION 11. SENIORITY.

Seniority of employees covered by this agreement shall be confined to the department employed in each of the following departments:

Tool and Die Shop,
Millwrights,

and confined within their respective classification as follows; machinists, apprentices, die men, machine operators, toolroom men, helpers and handy men, cranemen, and millwrights.

Seniority starts from the day of employment. When it becomes necessary to reduce expenses, the force shall be reduced.

Notice shall be given to the men affected before reduction is made, five days in advance, unless conditions beyond the company's control prevent, and lists will be furnished the Shop Committee.

The last man employed shall be the first man laid off.

In the restoration of forces, senior laid off men will be given preference of re-employment, if available within a reasonable time, and shall be returned to their former positions if practicable.

A copy of the seniority list will be made available at least twice a year to the Shop Committee and notice posted that copy is available in the employment office to the employees listed.

New employees are on probation for three months, during which time they may be laid off or discharged as exclusively determined by the Company.

Seniority shall cease upon (a) discharge for proper cause; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company records (it is the sole duty of each employee to advise the Company in writing of any change of address); (d) lay-off of one or more years duration; (e) failure to return to work at expiration of leave of absence.

Seniority lists shall be compiled according to service as defined in the Company's Rules and Regulations of May 1, 1936 and shown on the Company's records as of September 30, 1944 and such accumulated service shall be credited to the employee's departmental seniority for the purpose of placing his name on the department list. Employees employed after September 30, 1944 shall be placed on the department seniority list as of the date of employment in their respective classifications. Seniority lists will be made up as soon after October 1, 1944 as possible and posted in each department. Unless a written protest is made to the employment office within thirty (30) days after posting by men in active service of the Company or if not in active service, within 30 days after return to active service, length of service

and dates thereon shall not be changed and the list shall be considered approved and binding. There is to be no penalty in applying seniority before or during the thirty (30) day period the list is subject to approval of employees.

When a supervisor is reduced in rank to that of workman, he shall exercise his departmental seniority as shown on the departmental seniority list.

Any employee other than a temporary employee who shall enter the Armed Forces of the United States by conscription or voluntary enlistment shall not retain his seniority earned, but his seniority shall be accumulated during his entire period of such active service, for the purpose of seniority only; i.e., his position on the seniority list in accordance with provisions of the Federal law.

Any such employee who shall make application for reemployment within sixty days after having been relieved from such service shall be restored to his former position or one of like seniority, status and pay provided that he is in possession of a certificate of honorable discharge, that he satisfactorily shall pass the medical examination customarily given to all applicants for employment and provided that the circumstances of the Company have not so changed as to make it impossible or unreasonable that it agree to such reinstatement.

• • • •

PLAINTIFFS' EXHIBIT 33

AGREEMENT

This agreement, dated April 7, 1942 between Pullman-Standard Car Manufacturing Company, Bessemer Plant (hereinafter referred to as the "Company"), and Steel Workers Organizing Committee, Local No. 1466, or its successor (hereinafter referred to as the "Union"):

SECTION 1.

The bargaining unit covered by this agreement, by which the Union is recognized as the exclusive collective bargaining agent, subject to any change required by law, shall be as per the third paragraph of the National Labor Relations Board certification, dated November 19, 1941 as supplemented or clarified by letter of the respective unions to the Company dated December 19, 1941.

• • • •

SECTION 7. SENIORITY.

In all cases of increase or decrease of forces, the following factors shall be considered, and where factors "b", "c", and "d" are relatively equal, length of continuous service shall govern:

a. Continuous service;
b. Ability to perform the work;
c. Efficiency;
d. Physical fitness.

Seniority shall cease upon (a) discharge; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company employment records; (d) lay-off of one or more years' duration.

Nothing herein shall affect the application or definition of the term "length of service" or a similar term as contained in the Company's group insurance, contributory retirement income, pension, and vacation plan for hourly and piece work employees as amended July 14, 1941.

New employees are on probation for three months, during which time they may be laid off or discharged as exclusively determined by the Company.

No employee shall hold seniority in more than one department, nor exercise seniority in cases where men are finishing assigned work requiring two weeks, or less, to complete.

The Company reserves the right in case of shutdown to retain such employees as will best fit the Company's needs. Under such conditions there will be no restrictions as to the kind of work performed by leaders, foremen or force retained.

• • • •

PLAINTIFFS' EXHIBIT 34

AGREEMENT

THIS AGREEMENT, dated June 6, 1944, between Pullman-Standard Car Manufacturing Company, Bessemer, Alabama Plant (hereinafter referred to as the "Company"), and United Steelworkers of America in behalf of Local No. 1466, or its successor (hereinafter referred to as the "Union".)

* * * *

SECTION 7. SENIORITY.

In all cases of increase or decrease of forces, the following factors shall be considered, and where factors "b", "c", and "d" are relatively equal, length of continuous service shall govern:

a. Continuous service;
b. Ability to perform the work;
c. Efficiency;
d. Physical fitness.

Seniority shall cease upon (a) discharge for proper cause; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company employment records; (d) lay-off of one or more years' duration.

Nothing herein shall affect the application or definition of the term "length of service" or a similar term as contained in the Company's group insurance, contributory retirement income, pension, and vacation plan for hourly and piece work employees as amended July 14, 1941 and extended to cover the year 1944.

New employees are on probation for three months, during which time they may be laid off or discharged as exclusively determined by the Company.

No employee shall hold seniority in more than one department, nor exercise seniority in cases where men are finishing assigned work requiring two weeks, or less, to complete.

The Company reserves the right in case of shut-down to retain such employees as will best fit the Company's needs. Under such conditions there will be no restrictions as to the kind of work performed by leaders, foremen or force retained, but this provision is not applicable to production work continuing one week or more.

Any employee other than a temporary employee who shall enter the Armed Forces of the United States by conscription or voluntary enlistment shall not only retain his seniority earned, but his seniority shall be accumulated during the entire period of such active service. Any such employee who shall make application for reemployment within forty (40) days after having been relieved from such service shall be restored, to his former position or one of like seniority, status and pay provided that he is in possession of a certificate of honorable discharge, that he satisfactorily shall pass the medical examination customarily given to all applicants for employment and provided that the circumstances of the Company have not so changed as to make it impossible or unreasonable that it agree to such reinstatement.

• • • •

PLAINTIFFS' EXHIBIT 35

MEMORANDUM AGREEMENT

It is agreed this 30th day of September, 1944, between the United Steelworkers of America, Local No. 1466, and the Pullman-Standard Car Manufacturing Company, Bessemer, Alabama, plant to amend Section 6, "Vacations" and Article 7, "Seniority", 7-A and "Reporting Time" Section 7-B, also 7-C "Leave of Absence", as follows:

* * * *

SECTION 7. SENIORITY.

In all cases of increase or decrease of forces, the following factors shall be considered, and where factors shall be considered, and where "factors "b" and "c" are relatively equal, length of continuous service shall govern:

A—Continuous service.
B—Ability to perform the work.
C—Physical fitness.

Seniority shall cease upon (a) discharge for proper cause; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company records (it is the sole duty of each employee to advise the Company in writing of any change of address); (d) lay-off of one or more years duration; (e) failure to return to work at expiration of leave of absence.

Seniority lists shall be compiled according to service as defined in the Company's Rules and Regulations of May 1, 1936 and shown on the Company's records as of September 30, 1944 and such accumulated service shall

be credited to the employee's departmental seniority for the purpose of placing his name on the department list. Employees employed after September 30, 1944 shall be placed on the department seniority list as of the date of employment in their respective departments. Seniority lists will be made up as soon after October 1, 1944 as possible and posted in each department. Unless a written protest is made to the employment office within thirty (30) days after posting by men in active service of the Company or if not in active service, within 30 days after return to active service, length of service and dates thereon shall not be changed and the list shall be considered approved and binding. There is to be no penalty in applying seniority before or during the thirty (30) day periods the list is subject to approval of employees.

New employees are on probation for three (3) months, during which time they may be laid off or discharged as exclusively determined by the Company, provided this shall not be used because of membership in the Union. After the three (3) months probationary period has expired they shall cease to be probationary employees and shall be entered on the seniority list of the department in which they are working at the time the probation period expires and shall rank for seniority from the date they entered said department. There shall be no seniority among probationary employees. Departmental seniority will prevail for all employees other than probationary employees.

When a supervisor is reduced in rank to that of workman, he shall exercise his departmental seniority as shown on the departmental seniority list.

No employee shall hold seniority in more than one department, nor exercise seniority in cases where men are finishing assigned work requiring two calendar weeks, or less, to complete except as hereinafter provided. When an employee because of his exceptional ability is trans-

ferred from one department to another by the management, he shall retain and continue to accumulate seniority in the department from which he was transferred and his name shall also be entered upon the seniority list of his new department, as of the date of his entering the new department. No employee so transferred shall hold seniority in more than two (2) departments; i.e., his original department and the department in which he is now working.

An employee who is transferred from one department to another for any reason whatever except on orders from the Management shall relinquish seniority in the department from which he is transferred and shall start as a new employee in the department to which he is transferred and his name shall be entered on the new department seniority list as of the first day worked in the new department. An employee so transferred must make written request.

In the event of a reduction in forces of more than two calendar weeks employees who are laid off but who have satisfactorily completed their probationary periods and whose names appear on their respective departmental seniority lists will be allowed to displace probationary employees in other departments providing the laid off employee has the required qualifications and ability to perform the work. But such laid off employee's name shall not appear on his new or temporary departmental seniority lists unless he requests a transfer in which case his name will appear as of the date entered this new or temporary department, and in such case he shall automatically relinquish his seniority in his former department.

In case of shutdown the Company will retain such employees as will best fit the Company's needs and under such conditions there will be no restrictions as to the kind of work performed by leaders, foremen, or force

retained, but this provision is not applicable to production work continuing one week or more.

Employees already assigned to work on an order shall not exercise seniority on new or other orders except that if an employee is not given work on a new order within two calendar weeks after the completion of the previous order on which he worked, then he shall be authorized to exercise departmental seniority in getting a like occupation on any going order requiring two calendar weeks or more to complete.

Any employee other than a temporary employee who shall enter the Armed Forces of the United States by conscription or voluntary enlistment shall not only retain his seniority earned, but his seniority shall be accumulated during his entire period of such active service, for the purpose of seniority only; i.e., his position on the seniority list in accordance with provisions of the Federal law.

Any such employee who shall make application for re-employment within sixty days after having been relieved from such service shall be restored to his former position or one of like seniority, status and pay provided that he is in possession of a certificate of honorable discharge, that he satisfactorily shall pass the medical examination customarily given to all applicants for employment and provided that the circumstances of the Company have not so changed as to make it impossible or unreasonable that it agree to such reinstatement.

* * * *

PLAINTIFFS' EXHIBIT 38

AGREEMENT

THIS AGREEMENT, dated June 6, 1947, between Pullman-Standard Car Manufacturing Company, Bessemer, Alabama Plant (hereinafter referred to as the "Company"), and United Steelworkers of America in behalf of Local No. 1466, or its successor (hereinafter referred to as the "Union").

* * * *

SECTION 7. SENIORITY.

In all cases of increase or decrease of forces, the following factors shall be considered, and where factors "B" and "C" are relatively equal, length of continuous service shall govern:

A—Continuous Service.
B—Ability to perform the work.
C—Physical fitness.

Seniority shall cease upon (a) discharge for proper cause; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company records (it is the sole duty of each employee to advise the Company in writing of any change of address); (d) lay-off of one or more years duration; (e) failure to return to work at expiration of leave of absence.

Seniority lists shall be compiled according to service as defined in the Company's Rules and Regulations of May 1, 1936 and shown on the Company's records as of September 30, 1944 and such accumulated service shall be credited to the employee's departmental seniority for the purpose of placing his name on the department list. Employees employed after September 30, 1944 shall be

placed on the department seniority list as of the date of employment in their respective departments. Seniority lists will be made up as of June 1 and posted in each department. Unless a written protest is made to the employment office within thirty (30) days after posting by men in active service of the Company or if not in active service, within 30 days after return to active service, length of service and dates thereon shall not be changed and the list shall be considered approved and binding. There is to be no penalty in applying seniority before or during the thirty (30) day period the list is subject to approval of employees.

New employees are on probation for three (3) months, during which time they may be laid off or discharged as exclusively determined by the Company, provided this shall not be used because of membership in the Union. After the three (3) months probationary period has expired they shall cease to be probationary employees and shall be entered on the occupational seniority list of the department in which they are working at the time the probation period expires and shall rank for occupational seniority from the date they entered said department. There shall be no seniority among probationary employees.

Occupational seniority within a department will prevail for all employees other than probationary employees.

When a supervisor is reduced in rank to that of a workman, he shall exercise his seniority as shown on the seniority list.

No employee shall hold seniority in more than one occupation or department, nor exercise seniority in cases where men are finishing assigned work requiring two calendar weeks, or less, to complete except as hereinafter provided.

When an employee because of his exceptional ability is transferred by the management, he shall retain and

continue to accumulate seniority in the occupation from which he was transferred and his name shall also be entered upon the seniority list of his new department as of the date of his entering the new department. No employee so transferred shall hold seniority in more than two (2) occupations; i.e., his original occupation and the occupation in which he is now working.

An employee who is transferred from one occupation in a department to the same or other occupation in the same department or another department for any reason whatever except on orders from the Management shall relinquish seniority in the occupation from which he is transferred and shall start as a new employee in the occupation to which he is transferred and his name shall be entered on the new occupational seniority list as of the first day worked in the new occupation or department. An employee so transferred must make written request.

In the event of a reduction in forces of more than two calendar weeks employees who are laid off but who have satisfactorily completed their probationary periods and whose names appear on their respective seniority lists will be allowed to displace probationary employees in other occupations providing the laid off employee has the required qualifications and ability to perform the work. But such laid off employee's name shall not appear on his new or temporary occupation seniority list unless he requests a transfer in which case his name will appear as of the date entered this new or temporary occupation and in such case he shall automatically relinquish his seniority in his former occupation.

In case of shutdown the Company will retain such employees as will best fit the Company's needs and under such conditions there will be no restrictions as to the kind of work performed by leaders, foremen, or force

retained, but this provision is not applicable to production work continuing one week or more.

Employees already assigned to work on an order shall not exercise seniority on new or other orders except that if an employee is not given work on a new order within two calendar weeks after the completion of the previous order on which he worked, then he shall be authorized to exercise seniority in getting a like occupation on any going order requiring two calendar weeks or more to complete.

Any employee other than a temporary employee who has entered the Armed Forces of the United States by conscription or voluntary enlistment in accordance with the provisions of Selective Service and Training Act of 1940 as amended, shall not only retain his seniority earned, but his seniority shall be accumulated during his entire period of such active service, for the purpose of seniority only; i.e., his position on the seniority list in accordance with provisions of the Federal law.

Any such employee who shall make application for reemployment within ninety (90) days after having been relieved from such service shall be restored to his former position or one of like seniority, status and pay provided that he is in possession of a certificate of honorable discharge, that he satisfactorily shall pass the medical examination customarily given to all applicants for employment and provided that the circumstances of the Company have not so changed as to make it impossible or unreasonable that it agree to such reinstatement.

Nothing herein shall affect the application or definition of the term "length of service" or a similar term as contained in the Company's group insurance, contributory retirement income and pension plan.

• • • •

PLAINTIFFS' EXHIBIT 41

AGREEMENT

THIS AGREEMENT, dated August 26, 1954, between PULLMAN-STANDARD CAR MANUFACTURING COMPANY, Bessemer, Alabama Plant, (hereinafter referred to as the "Company") and the UNITED STEELWORKERS OF AMERICA (hereinafter referred to as the "Union").

* * * *

SECTION 12. SENIORITY

In all cases of increase or decrease of forces, the following factors shall be considered, and where factors "B" and "C" are relatively equal, length of continuous service shall govern:

A—Continuous Service.
B—Ability to perform the work.
C—Physical fitness.

Seniority shall cease upon (a) discharge for proper cause; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company records (it is the sole duty of each employee to advise the Company in writing of any change of address); (d) absence due to layoff or a disability other than a comparable disability, in excess of two (2) years for those employees with seniority up to ten (10) years at the commencement of such layoff, and absence due to layoff or a disability, other than compensable disability, in excess of three (3) years for those employees with ten (10) or more years of seniority at the commencement of such layoff; (e) absence for a period exceeding that for which statutory compensation was payable due to an injury received in the course of em-

ployment; (f) failure to return to work at expiration of leave of absence.

Seniority lists shall be compiled according to service as defined in the Company's Rules and Regulations of May 1, 1936, and shown on the Company's records as of September 30, 1944, and such accumulated service shall be credited to the employee's departmental seniority for the purpose of placing his name on the department list. Employees employed after September 30, 1944 shall be placed on the department seniority list as of the date of employment in their respective departments. Seniority lists will be made up as of June 1 and posted in each department. Unless a written protest is made to the Employment Office within thirty (30) days after posting by men in active service of the Company or if not in active service, within thirty (30) days after return to active service, length of service and dates thereon shall not be changed and the list shall be considered approved and binding. There is to be no penalty in applying seniority before or during the thirty (30) day period the list is subject to approval of employees.

New employees are on probation for forty-five (45) days of work, during which time they may be laid off or discharged as exclusively determined by the Company, provided this shall not be used because of membership in the Union. However, the employment of a probationary employee shall not be terminated while he is absent from work due to personal illness or a non-occupational injury, provided that (1) such absence does not exceed six (6) months in the aggregate during his probationary period, and (2) he furnishes proof to the Company that such absence was due to personal illness or non-occupational injury. After the forty-five (45) days of work probationary period has expired, they shall cease to be probationary employees and shall be entered on the departmental seniority list of the department in which

they are working at the time the probation period expires and shall rank for departmental seniority from the date they entered said department. There shall be no seniority among probationary employees.

Departmental seniority will prevail for all employees other than probationary employees.

Employees promoted to supervisory positions shall retain and continue to accumulate seniority and when reduced in rank to that of a workman, they shall exercise their departmental seniority as shown on the seniority list.

An employee hereafter transferred to a position outside of the bargaining unit, other than a position of supervisor over employees in the bargaining unit, shall lose his seniority in the bargaining unit at the time of such transfer.

An employee who is transferred from one department to another department for any reason whatsoever except on orders from the management shall relinquish seniority in the department from which he is transferred and shall start as a new employee in the department to which he is transferred and his name shall be entered on the new department seniority list as of the first day worked in the new department. An employee so transferred must make written request.

No employee shall hold seniority in more than one department, except as provided in the following five paragraphs:

> When an employee because of his exceptional ability is transferred by the management, he shall retain and continue to accumulate seniority in the department from which he was transferred and his name shall also be entered upon the seniority list of his new department as of the date of his entering the new department. No employee so transferred

shall hold seniority in more than two (2) departments; i.e., his original department and the department in which he is now working. An employee transferred at the request of management shall be returned by management within a period of one (1) year from date of transfer to his original department from which transferred. When the job to which management transferred the employee is completed, the employee shall be returned to his original department and shall lose any accumulated seniority in the department to which he was transferred immediately upon his leaving such department. If, however, at the time of completion of the job on which he is working, there is no work available in his original department, he shall continue working in his new or temporary department until such time as his seniority in his original department warrants him a job. If the employee so transferred elects to remain in the new department, he shall relinquish seniority in the department from which he is transferred and shall start as a new employee in the department to which he is transferred and his name shall be entered on the new department seniority list as of the first day worked in the new department. An employee so transferred must make written request.

An employee laid off for lack of work in his department for a period that is expected to exceed five (5) working days shall be given preference in other departments before the Company hires new men, provided such employee has seniority and the ability to perform the work.

Laid off employees desiring to work in other departments must present Drop Slips to the Employment Office, at which time they shall be presented with "Request for Work" forms which they must

fill in and sign, duplicate to be retained by employee after being endorsed by the Employment Manager or his representative. Employees laid off must present their Drop Slips to the Employment Office as soon as possible. They will waive any "plant" seniority rights until they have done so.

An employee laid off because of lack of work in his department for a period that is expected to exceed five (5) working days and who has satisfactorily completed his probationary period and whose name appears on his department seniority list, will be allowed to displace probationary employees in other departments, provided the laid off employee has the qualifications and ability to perform the work equal to that of the probationary employee involved, and provided he informs the Employment Department in writing of his desire at the time of layoff.

Any laid off employee given work in another department shall hold seniority in his new department as of the date of entering that department and shall be notified to return to his original department according to his seniority. If the employee elects to remain in the department in which he is working and does remain therein, his seniority in that department shall date from the last day he entered it and his seniority in his former department shall be terminated. If after such laid off employee is assigned to a job in another department management relieves him from performing the job because of his lack of ability, such employee shall lose any accumulated seniority in that department but shall retain his seniority in his former department.

Employees on the track or related departments (Truck Shop, Steel Construction, Welding, Steel Erection, Air Brake, Wood Erection and Paint-Shipping Track) al-

ready assigned to work on an order shall not exercise seniority on new or other orders except that if an employee is not given work on a new order within five (5) work days after the completion of the previous order on which he worked, then he shall be authorized to exercise seniority in getting a like occupation on any going order requiring five (5) working days or more to complete. However, when it is known that the track on which he worked will not start before five (5) working days, the employee shall signify to his foreman his intention to exercise his seniority on the going track or order at the time of completion of work on the order on which he is working, then he shall be placed on the going track or order not later than one day after completion of the order on which he worked.

Except in the case of a temporary layoff (not to exceed three (3) work days) employees shall be laid off on a departmental basis in accordance with their departmental seniority. After the laid-off employee is sent his notice of recall, the foreman may fill the position with any employee available, regardless of seniority, until such time as the laid off employee returns and is ready to go to work.

In changing over tracks from one car order to another, where it is necessary to realign highlines and change equipment in different positions of the track, such work is to be done by maintenance employees regularly assigned to that work, such as pipefitters, millrights, electricians, welders, etc.

In the event of a reduction of more than five (5) work days in the work force in any department, the Grievance Committeeman (who must have at least two (2) years' seniority in the plant), if there is any in that department, shall be retained if the reduction in work force in that department continues to the point at which he would otherwise be laid off, provided he is capable of

performing the work remaining in his department. If a Grievance Committeeman is working in a department to which he was transferred by management, this section shall apply only to the department from which he was transferred.

The Chairman of the Grievance Committee will be given a daily written report of hires, quits, discharges, recalls, layoffs, transfers, leaves of absence, and retirements of employees in the bargaining unit on the second work day following same.

• • • •

PLAINTIFFS' EXHIBIT 42

AGREEMENT

This Agreement dated this 27th day of August, 1956 is between PULLMAN-STANDARD CAR MANUFACTURING COMPANY, a Delaware Corporation, (hereinafter referred to as the "Company") and UNITED STEELWORKERS OF AMERICA, an international labor organization, (hereinafter referred to as the "Union").

• • • •

SECTION II.

SCOPE OF AGREEMENT

This Agreement relates only to the Company's Bessemer, Butler, Pullman Car Works, Worcester, Hammond and Hammond Wheel plants.

The term "employee" as used in this Agreement applies to those employees of the Company employed in or around said plants and with respect to each of said plants the term "employee" shall be defined as follows:

Butler Plant—All maintenance and production employees of the Company employed in and about the Company's plant located at Butler, Pennsylvania, including Railroad Switching Department, Leaders, Testers and Production Checkers; however, excluding Foremen, Assistant Foremen, Watchmen, Guards, Office Employees, Supervisors, Shop Clerical Employees, Expediters, Nurses, Safety Director and Assistants, and all monthly rated employees.

Bessemer Plant—All production and maintenance employees of the Company employed in and about the Company's plant located at Bessemer, Alabama, including watchmen and plant protection employees, but excluding superintendents, foremen, assistant foremen, leaders,

time clerks, clerical employees, office employees, any salaried employees doing no manual labor in the plant, salesmen, or any of the management and also excluding employees represented by the International Association of Machinists, which includes millwrights, and all Die and Tool employees except welders, laborers, and hookons.

Pullman Car Works Passenger Car Plant—All production and maintenance employees of the Company employed in and about the Company's Pullman Car Works, Passenger Car Plant, located at Chicago, Illinois, including watchmen, production instructors and factory clerks of the Pullman Car Works, Passenger Car Plant, excluding executives, foremen, assistant foremen, leaders, bill-makers, roundsmen, rate clerks, price setters (time study men), chief clerks and salary roll employees in the factory, general office employees on the payroll of the manager, superintendent, employment, purchasing and stores, engineering, accounting, safety and dispensary, training department, stationary engineers, production and maintenance electricians, and metal polishers, buffers, regularly assigned platers and helpers, and armed guards.

Worcester Plant—All production, maintenance and stores employees of the Company employed in and about the Company's Worcester, Massachusetts plant, including gang leaders, but excluding foremen, assistant foremen, leaders, time clerks, watchmen, any salaried employee doing no manual labor in the plant, clerical workers, office employees and salesmen. It is agreed that under no circumstances whatever are powerhouse employees to suspend performance of their assigned duties.

Hammond Works—All production and maintenance employees of the Company employed in and about the Hammond Works of the Company located at Hammond, Indiana, including inspectors, factory clerks, and leaders,

but excluding general office employees, foremen, assistant foremen, nurses, safety director and assistants, time study men and watchmen.

Hammond Car Wheel Plant—All production and maintenance employees of the Company employed in and about the Hammond Car Wheel Plant of the Company located at Hammond, Indiana, excluding clerical employees, supervisory employees, leaders who are assistant foremen, A.A.R. clerks and watchmen.

* * * *

SECTION VI.

SENIORITY

A. *Seniority Status of Employees*

The parties recognize that promotion opportunity and job security in event of promotions, decreases of forces, and rehirings after layoffs should increase in proportion to length of continuous service, and that in the administration of this Section the intent will be that wherever practicable full consideration shall be given continuous service in such cases.

In recognition, however, of the responsibility of Management for the efficient operation of the works, it is understood and agreed that in all cases of:

1. Promotion (except promotions to positions excluded under the definition of "employees" in Section II—SCOPE OF AGREEMENT) the following factors as listed below shall be considered; however, only where factor "b" is relatively equal shall factor "a" length of continuous service be the determining factor:

   a. Continuous service,

   b. Ability to perform the work, which includes physical fitness.

2. Decrease in forces or rehirings after layoffs the following factors as listed below shall be considered; however, only where factor "b" is relatively equal shall factor "a" length of continuous service be the determining factor:

   a. Continuous service,

   b. Ability to perform the work, which includes physical fitness.

3. In the case of decrease of forces and subsequent increase of forces, the senior employee who has previously demonstrated his "ability to perform the work" shall not be questioned on relative ability provided he otherwise qualifies on "physical fitness."

B. *Establishment of Plant Seniority Rules.*

To the end of encouraging application of the principle that employment security should increase with continuous service, consistent with Subsection A above, in connection with promotions, layoffs and rehiring after layoffs, the appropriate representatives of the Company and the Union at each plant, shall if request is made of either party, review the existing local seniority agreement. The representative duly designated by the International Union for this purpose and the Company Industrial Relations Executive (or his representative) shall be available to advise and consult with the plant representatives of the parties. Any revised agreements on which the local plant representatives of the parties may agree shall be placed in effect as soon as possible.

The existing seniority unit or units for application of the seniority factors, including service dates within these units, covered by existing local agreements, shall remain in effect unless or until modified by local written agreement signed by Management and the local union negotiating committee. Hereafter local seniority agreements

shall be signed by the local union committee, who are to post such agreements in the plant.

C. *Calculation of Continuous Service*

Continuous service shall be calculated for the purpose of establishing seniority lists under this contract in accordance with the rule or rules set forth in individual plan agreements as were in effect on August 31, 1956.

There shall be no deduction for any time lost which does not constitute a break in continuous service.

Continuous service shall be broken by:

a. Quit.

b. Discharge.

c. Failure to return to work within five (5) days after receipt of notification by registered or certified letter or telegram to his address last furnished the Company (it being the sole duty of the individual employee to inform the Company of changes of address).

d. Absence due to layoff or a disability other than a compensable disability, in excess of two (2) years for those employees with seniority up to ten (10) years at the commencement of such absence; and, absence due to layoff or a disability, other than a compensable disability in excess of three (3) years for those employees with ten (10) or more years of seniority at the commencement of such absence.

e. Failure to return to work at the expiration of leave of absence.

D. *Probationary Employees*

New employees of the Company which includes those hired after a loss of seniority, shall be considered proba-

tionary employees for the first thirty (30) days they work. If laid off during this probationary period due to lack of work, they shall be the first to be returned to work after all qualified men are working, provided that at the time of layoff they notify the Employment Office. When such new employees are laid off they must present Drop Slips to the Employment Office, at which time they shall be presented with "Request for Work" forms which they must fill in and sign. The Company shall have exclusive right to lay off or discharge for cause any such probationary employee at any time, provided this provision shall not be used for purposes of discrimination against the Union. Probationary employees may file and process grievances under this Agreement. The employment of a probationary employee shall not be terminated while he is absent from work due to personal illness or a non-occupational injury, provided that (1) such absence does not exceed six (6) months in the aggregate during his probationary period, and (2) he furnishes proof to the Company that such absence was due to personal illness or a non-occupational injury. The employment of a probationary employee shall be terminated in the event he is laid off due to a lack of work for a period in excess of six (6) months during his probationary period. Names of such probationary employees after their 30th day worked shall be placed on the seniority list as of the last date of hire.

E. *Leaves of Absence*

Employees, upon written application setting forth good cause, may be granted a written leave of absence by the Company without pay and without loss of seniority, except as provided in Section XV—VACATIONS, Subsection A.

Leaves of absence for the purpose of accepting positions with the International or Local Unions shall be available to a reasonable number of employees. Ade-

quate notice of intent to apply for leave shall be afforded local plant Management to enable proper provision to be made to fill the job to be vacated.

Leaves of absence shall be for a period of not in excess of one year and may be renewed for a further period of one year. Continuous service shall not be broken by the leave of absence but will continue to accrue.

F. *Seniority Lists*

The Company shall make available to the Local Union concerned lists showing the relative continuous service of each employee in each seniority unit. Such lists shall be revised by the Company from time to time, as necessary, but at least every six months, to keep them reasonably up-to-date. The seniority rights of individual employees shall in no way be prejudiced by errors, inaccuracies, or omissions in such lists.

Employees promoted to supervisory positions shall retain and continue to accumulate seniority and when reduced in rank to that of a workman, they shall exercise their departmental seniority as shown on the seniority list.

An employee hereafter transferred to a position outside of the bargaining unit, other than a position of supervisor over employees in the bargaining unit, shall lose his seniority in the bargaining unit at the time of such transfer.

The Chairman of the Grievance Committee will be given a daily written report of hires, quits, discharges, recalls, layoffs, transfers, leaves of absence, and retirements of employees in the bargaining unit on the second work day following same.

* * * *

PLAINTIFFS' EXHIBIT 50

PRODUCTION AND MAINTENANCE DEPARTMENTS OF PULLMAN'S BUTLER, PENNSYLVANIA PLANT

1965

Department	Whites	Blacks
Shear	132	0
Press	101	0
Punch	146	0
Forge	56	0
Construction	171	0
Steel Erection	330	5
Welding	661	0
Paint & Equipment	352	9
Shipping	12	0
Steel Stores	73	1
Bolt & Rivet	5	0
Tool Room	4	0
Die & Tool	89	0
Maintenance (actually Millwright)	36	0
Electrical & Cranes	123	0
Machine Repair	19	0
Truck, Wheel & Axle	56	0
Garage	9	0
Non-Skilled Pool (Hookons and Laborers	84	0
Carpenter Shop	14	0
Railroad	22	0
Powerhouse	10	0
Wood Erection		
Wood Planning		
Inspection	18	0
Pattern & Template	3	0
Storeroom	1	0
Bricklayers	4	0

PLAINTIFFS' EXHIBIT 51

Memorandum of the position taken by Mr. Howard of AF of L regarding various sections of proposed contract —12/9/41.

Section 1. Agreement

AF of L contends agreement is to be between Company and the Association and not employees as represented by Association. They will accept the truck shop employees as referred to in Board Certification but say they do not want them.

* * * *

PLAINTIFFS' EXHIBIT 65

Bessemer—March 2, 1943

United Steelworkers of America
Meeting with Contract Committee:

A meeting was held with the contract committee at 4:00 P.M. at the General office, with the following present:

For the Union:

B. F. Gage—Union representative
R. F. Aldridge (w)
J. H. Smith (w)
J. I. Odom (w)
McKinley McCreary (c)
Perry L. Thompson (c)

For the Company:

W. C. Sleeman
O. A. Wiltsie

* * * *

One of the colored committeemen, McKinley McCreary, asked Mr. Sleeman if there were not a provision for a man drawing out of the Union on 15 days notice. * * *

* * * *

PLAINTIFFS' EXHIBIT 66—FIRST DOCUMENT

PULLMAN-STANDARD CAR MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

SUBJECT: LABOR TROUBLE
PLEASE REFER TO FILE C.I.O.

Bessemer, Alabama,
January 10, 1944

MEMORANDUM:

Capt. Walter C. Smith, Chief Industrial Labor Relations Officer, 4th Transportation Zone, Atlanta, came to plant at approximately 3:30 today in response to Mr. Sleeman's telephone conversation with Captain Smith (not Walter C.) of this morning.

* * * *

At approximately 7:00 P.M. Capt. Smith returned to Mr. Sleeman's office and advised the men voted not to return to work and they would have another meeting Tuesday, January 11th, at which time they would vote to strike. Capt. Smith stated a number of the negroes wanted to return to work and several of them threatened to frighten Preacher McCreary, stating he was the one who was causing the men to strike. Capt. Smith also told Sleeman in his opinion McCreary was the one man who was the cause of the trouble. The conversation between Capt. Smith and Sleeman at approximately 7:30 P.M. was held in the presence of Capt. Smith, Sleeman and Mr. Ellithorpe. Capt. Smith also stated it was difficult for him to talk to these negroes, as they appeared to be of a class that would not understand the ordinary conversation.

W. C. SLEEMAN

PLAINTIFFS' EXHIBIT 66—SECOND DOCUMENT

PULLMAN-STANDARD CAR MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

SUBJECT: LABOR TROUBLE

PLEASE REFER TO FILE C.I.O.

Bessemer, Alabama,
January 10, 1944

MEMORANDUM:

For several days there has been sand house talk among the negroes that when we went to the Goverenment cars they intended to strike on account of the action taken by the Regional Labor Board in denying a wage increase and it also, in several cases, has come to our attention the company would not accept the Regional Board's decision.

On Monday morning at around 7:30 A.M., as Mr. Sleeman was driving into the plant he saw approximately 12 colored going out of the gate. He stopped them and asked what was the matter. They stated they were going out. Sleeman asked them why and if they were quitting. They said they were not quitting, but were afraid to work. Sleeman asked them why and after considerable questioning, they stated they were afraid of someone throwing bombs on their porch at night and there was a reluctance on their part to discuss the matter, other than to say they were afraid. Two of these men recognized were Franklyn from the track and Richard Gerrett from the track, both colored. On checking the roll, it was found 61 colored had come into the plant and quit work and walked out. There was a number of colored who had quit, however and were sitting around the bath house doing nothing

when Mr. Green went around each bath house and told them they would either have to go to work or be given out cards. Those who went out were given out cards, some marked "Refused to work" and some marked "Don't want to work." A complete memorandum as to the number present and number working, etc., is shown on the attached exhibit.

Work in the shop was not stopped with the exception of actually building the cars on the track. In this department, the white men and those who remained of the colored were used in further lining the track up for production. The balance of the other departments continued to work. There were, however, some few colored in the other departments who did not work, but these were few in number.

* * * *

W. C. SLEEMAN

PLAINTIFFS' EXHIBIT 67

LABOR UNION—CIO

MEMORANDUM TO FILE

Bessemer—January 14, 1944

Meeting was held on Thursday, January 13, 1944.

Those present were:

Mr. V. C. Finch, United States Conciliation
Mr. Mead, Alabama Department of Labor

Major Street, 4th Transportation Zone, Atlanta
Captain Smith, 4th Transportation Zone, Atlanta
Major Smith, 4th Service Command, Birmingham

Mr. B. F. Gage, U.S.W. of A.
Mr. R. M. Poarch, U.S.W. of A.
W.O. Bradshaw, Shop committeeman
McKinley McCreary (c), Shop committeeman
Perry Thompson (c), Shop committeeman
Gus Dickerson (c), Shop committeeman

Mr. W. C. Sleeman, representing the Company
Mr. F. W. Green, representing the Company
Mr. A. F. Smith, representing the Company
Mr. J. E. Bolen, representing the Company
Mr. James Davidson, representing the Company
Mrs. Grimes, representing the Company

The meeting was opened by Mr. Sleeman who explained to those present that meeting had been requested by Mr. Finch for the purpose of handling some grievances which the CIO representatives had brought up at the hall and which they claimed were the cause of the two-day strike. The conciliators were told that at the present time there were no unsettled grievances on the

manager's desk, neither did Mr. Green, the plant superintendent, have any unsettled grievances on his desk. And also that, in so far as we knew, no grievance had been brought up that was not settled at the present time. Mr. Gage was requested to present the grievance and he advised that possibly the colored boys could explain their grievances better inasmuch as they were the ones affected.

McKinley McCreary (c) entered into a long statement in connection with the transferring of men from the Bomb Shop back to other departments, having particular point on Frank Zeigler who had worked also in the Bomb Shop and upon his having been laid off at the completion of work in the Bomb Shop was placed in the Yard Department labor gang.

* * * *

PLAINTIFFS' EXHIBIT 69

Bessemer, Alabama
October 24, 1944

MEMORANDUM OF MEETING REGARDING LABOR UNION C.I.O. CONTRACT AMENDMENT

Meeting held in Mr. Sleeman's Bessemer Office.

Present:

Messrs. W. C. Sleeman
J. E. Bolen
E. E. Perkins
H. G. Wesley
H. S. Thompson
A. F. Smith

• • • •

SENIORITY

• • • •

2. Seniority, as it is now understood by the contract, means the position of a man in the departmental seniority list for the purpose of hiring and laying off.
• • •

• • • •

W. C. SLEEMAN

WCS/jc
cc: Messrs. D. L. Golden
W. C. Sleeman (Birmingham Office)
J. E. Bolen
E. E. Perkins
H. G. Wesley
H. S. Thompson
A. F. Smith

PLAINTIFFS' EXHIBIT 70

LABOR UNIONS—C.I.O.

Bessemer, Ala.,
May 26, 1945

CONFIDENTIAL

MR. N. B. JOHNSON: (2 copies)

* * * *

(2) In negotiations the Union asked for the following:

More liberal vacation plan
60½¢ minimum rate
Job evaluation study
Elimination of Negro differentials
Piece work pay when working on sample oar
Job inequality adjustment
Closed shop for those represented
Retroactive shift differential
Top seniority for union officials
Altered grievance procedure
Retroactive pay on adjustment of job inequalities
Incentive bonus.

(3) It must be borne in mind that we are certain the Union would never sign any joint request to the War Labor Board to ask for the elimination of union maintenance or a new escape clause and if it had come to a point where the matter had to be again referred to the War Labor Board for directive, we would have found ourselves facing a new disposition of the above items, some of which at this particular time would have been difficult to dispose of, especially since there is now a very active movement on the part of the colored to push themselves to a point of doing the same job as the white man. This has been confirmed to me by the fact that representatives of the C.I.O. have stated to me that they are having trouble all over the district with their colored membership to the extent that in some of the plants

numbers of the colored have walked off the job, stating that they have been advised if they don't get what they are after now, they never will get it and again am advised that the F.E.P.C. have representatives in the district who are doing considerable work.

(4) We also know that in numerous meetings we have had recently the colored representation always inject negro differentials and that they should be permitted to have negro leaders over the negro man.

(5) Had we forced the issue of union maintenance, a fighting attitude upon the part of the union on several of the bad items above mentioned would have put this plant into such an upset condition and turmoil, little production or cooperation from anyone could be expected and the forestalling of these issues for another year by going along with the old contract as it was with the changes innumerated in our memorandum agreement gives us a lever to combat for another year the very things which might at the end of that time have an entirely different angle.

(6) Notwithstanding all of the above, we did what we thought was in our best judgment, together with the approval of Forney Johnston from a legal standpoint, the best procedure to follow for Bessemer Plant. However, had we been apprised of the fact that regardless of the above existing conditions, the Management desired to bring union maintenance out on the table again, we would have followed that procedure, even if it meant shutting down the plant, which probably would have been the result.

W. C. SLEEMAN

PLAINTIFFS' EXHIBIT 71

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY
INTER-DEPARTMENT CORRESPONDENCE

Bessemer, Alabama,
July 14, 1945

SUBJECT: *LABOR UNION—C.I.O.*

PLEASE REFER TO FILE: *Grievance Committee Meeting*

MEMORANDUM of meeting held in Mr. Sleeman's office at 4:30 P.M., July 11, 1945:

Present for Management:

W. C. Sleeman
J. E. Bolen
A. F. Smith

United States Army:

Major H. N. Smith
Lt. Phil B. Armour

Representing C. I. O.:

R. M. Poarch, Representative
B. F. Gage, Representative

• • • •

Clarence Martin)
J. M. Herring)
Hewitt Fields) Committeemen
Allen Richardson)
E. B. Jackson)

(4) E. B. Jackson then stated that the differential between the rates for white employees and colored employees was too great on account of the skill of the colored employees.

• • • •

A. F. SMITH

PLAINTIFFS' EXHIBIT 74

Birmingham, Ala.
May 29, 1947

C.I.O.

MEMORANDUM:

* * * *

(7) The picket line situation was quiet. Around noon the number of pickets was about 25, and about 75% of these colored. No violence has taken place since the trouble on the first day of the strike.

WCS/jd

cc: Mr. Bolen

PLAINTIFFS' EXHIBIT 75

Birmingham, Alabama
June 4, 1947

C.I.O.

MEMORANDUM:

(1) At the request of Conciliator Pierce, Messrs. Farr, Pierce, Sleeman, Bolen, and Poarch, and in part of the meeting Mr. Reemer was present, sat in Mr. Sleeman's office, as Mr. Pierce stated—to attempt to settle the strike or at least talk things over. The meeting was called at 10:30 A.M. and it lasted until 12:45 P.M.

(2) The Company stated its stand by saying that on previous meetings before the 15½¢ was offered to the committee and Mr. Gage, it was with the understanding that they would accept and sign the contract but after the offer was made then several of the colored objected to it, stating that they wanted certain inequities corrected. In all meetings as well as the one held this morning it boiled down that these inequities did not mean one or two occupations but the majority of the colored occupations except for the day laborers. * * *

* * * *

WCS/jd

cc: Mr. Bolen

PLAINTIFFS' EXHIBIT 76

Bessemer, Alabama
April 27th, 1948

INSURANCE

* * * *

4. On Tuesday afternoon Messrs. Pierson, Bolen and myself met with the C.I.O. committee and introduced Mr. Pierson as a Prudential Insurance man who makes periodical visits to the plant to survey our insurance conditions, etc., etc. and took that method. We asked the committee members to express their opinions about our present insurance plan. The very first objection, and strongly so, was that our hospital and surgical plan was

inadequate to meet their requirements and the whites expressed they would be willing to pay more money for an improvement in the plan. The colored, however, were a little reluctant about a change in the premium but they finally stated they felt if a better plan could be offered for the surgical and hospitalization they probably would at least get 95% of those now participating to go to the extent of a $1.00 each. There was somewhat of a feeling among the colored that they would take this improvement even to the extent of having the Life Insurance and Accidental Death somewhat reduced. They also expressed the opinion that the tie in of burial insurance might be beneficial and help sell the idea of increase and change to meet their suggested bettered hospital plan.

* * * *

W. C. SLEEMAN

PLAINTIFFS' EXHIBIT 81

PULLMAN-STANDARD CAR MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

Bessemer, Alabama
August 10, 1950

SUBJECT: *CI.O.—Contract Negotiations*

Please Refer To File

MEMORANDUM OF MEETING HELD AUGUST 10, 1950 IN OFFICE OF FEDERAL MEDIATION AND CONCILIATION SERVICE IN BIRMINGHAM AT 10:00 A.M.

Present for Company:	*Present for Union:*	
W. C. Sleeman	R. E. Farr, District Director	
D. L. Golden	Van D. Jones, Field Representative	
J. E. Bolen	Shewmake	
F. W. Green	J. M. Herring	)
A. F. Smith	W. P. Vance	)
	John Hubbard	) Negotiating
	Joe Brooks (c)	) Committee
	Gus Dickerson (c)	)
	Perry Thompson (c)	)

V. C. Finch, Federal Conciliator, presided over the meeting.

* * * *

Mr. Sleeman than discussed the question of holding seniority in two departments, after Vance had stated that he knew he had less seniority than Quick on the Shipping Track but that he also had seniority in the Paint Department and that he could be retained on that account.

* * * *

A. F. SMITH

PLAINTIFFS' EXHIBIT 82

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY

Bessemer, Alabama
March 28, 1951

C. I. O.

MR. N. B. JOHNSON:

• • • •

On the wage inequity program, believe Mr. Jones was somewhat surprised when we explained to him actually how our wage structure works and how some of the rates had been bounced around by the War Labor Board's decisions, which were not only unsatisfactory to the Company but not satisfactory to the men and as a result further changes were made. Mr. Jones was not aware of this and he wanted more time to study their files. We are inclined to think that the committee as a whole, with the exception of the colored, are not so interested in the wage inequity program as much as they are in a good substantial increase in money. They were told within the next several weeks we have a long run of cars and the money was there, all they needed to do is go in and get the cars and they could get the money.

• • • •

W. C. SLEEMAN

PLAINTIFFS' EXHIBIT 84

Bessemer, Alabama
July 11, 1951

C.I.O.

MEMORANDUM:

* * * *

Saturday—July 7, 1951—

* * * *

Around noon Saturday one white picket and one colored were at the railroad gate, and a train crew when attempting to place cars in the yard they would not run over the no strike sign which was placed between the middle of the rails immediately outside of the plant gates, and the white picket stood on the track. * * *

* * * *

Wednesday—July 11, 1951—

Railroad attempted to put cars in this A.M. and Gus Dickerson, who had been talking to a number of the pickets, which was approximately 5—one white and 4 colored, and who had also been served papers on the strike, apparently left word with those picketing to stay on the job, and he left immediately prior to the attempt to push cars in. * * *

* * * *

W. C. SLEEMAN

PLAINTIFFS' EXHIBIT 85

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

Bessemer, Alabama

July 11, 1951

SUBJECT: *C.I.O.*

Please Refer To File

MEMORANDUM

This morning at 11:25, Messrs. Guyton, Cassaday, Horton, Ellithorpe and Bolen went to the south railroad gates, unlocked and opened same, at which time there were two white pickets and three colored pickets immediately outside of the gates. Upon our arrival, one of the white boys walked toward an automobile located in the vicinity of the Birmingham Southern office and when he had gotten about half way between the railroad gate and the automobile he called out, "Are we going to eat?". This automobile was a Chevrolet, two-tone (green and black) convertible which left immediately thereafter and within a very short time, several carloads of pickets, both colored and white, arrived on the scene.

At this time, there was located in the center of each incoming track, CIO posters made up of a cardboard approximately 2' square, tacked up to a stick which was driven down between the rails.

* * * *

When the pickets returned to their stand just outside the railroad gates, they proceeded to remove and throw on the ground, the notes which the deputy and attorneys

had posted and re-established the picket signs in the center of the railroad trains. At this time there were approximately fifteen white and twenty-five or thirty colored pickets at the railroad gates.

J. E. BOLEN

PLAINTIFFS' EXHIBIT 86

Bessemer, Alabama
July 13, 1951

C.I.O.

MEMORANDUM:

Thursday—July 12, 1951—

* * * *

Was at the plant Thursday afternoon. Found that there was probably 15 to 20 men under the tent at the picket line. There was no car stopping but now strike signs had been placed in the middle of the road, and new signs at the railroad gates. 4 or 5 colored pickets were at the railroad gates.

* * * *

Friday—July 13, 1951—

Was at the plant. The usual 15 or 20 pickets were in the tent but none on the road. There were 3 colored at the railroad gate. Strike signs were still in the middle of the road and at the railroad gates * * *

* * * *

PLAINTIFFS' EXHIBIT 93

C.I.O.—Contract Negotiations Bessemer, Alabama

September 12, 1952

MEMORANDUM OF MEETING HELD IN MANAGER OF WORKS' OFFICE AT 2:00 P.M. FRIDAY, SEPTEMBER 12, 1952:

Present for Company:	*Present for Union:*
W. C. Sleeman	Van D. Jones
J. E. Bolen	J. M. Herring
A. F. Smith	C. G. Quick
	Perry Thompson
	Gus Dickerson

• • • •

3. It was further agreed that the Company was to prepare a new seniority list, one headed "Steel Stores", which would take in the group of men working under Joe Decatur and the other headed "Steel Miscellaneous", taking in the men under the direct supervision of Mr. Studdard. These two lists will replace the present "Steel Stores" seniority list.

• • • •

PLAINTIFFS' EXHIBIT 94

C.I.O.

Bessemer, Alabama
September 13, 1952

MEMORANDUM:

In connection with the signing of the Agreement on Friday, September 12th, so as not to overlook any procedures which we are required to follow in addition to the general routine of taking care of necessary things, the following should also be taken care of:

(1) Within the next day or two, since it was agreed with the local committee yesterday, in the presence of Mr. Van Jones, we are to prepare a new seniority list; one headed "Steel Stores", which would take into that group those men who have been working with Joe Decatur, cranemen, hookons, laborers. On the outside crane, building #3 aisle, the crane runway on the west side of the building and the unloading on the crane runway, on the east side of building #3. A separate list is to be prepared for the Steel Miscellaneous, which would take in all the crane operators, hookons, etc. in the steel shop, including the Punch & Shear, Press, Steel Construction, Steel Erection and Welding building. The balance of the departments, such as the Wood Shop, Wood Erection, Forge Shop, etc. will remain as is.

* * * *

PLAINTIFFS' EXHIBIT 95

PULLMAN-STANDARD CAR MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

SUBJECT: UNITED STEELWORKERS OF AMERICA

Please Refer To File CONTRACT NEGOTIATIONS

Bessemer, Alabama

August 25 & 26, 1954

MEMORANDUM OF MEETING HELD IN MANAGER OF WORKS' OFFICE AT 1:30 P.M. WEDNESDAY, AUGUST 25, 1954, AND AT 10:00 A.M. THURSDAY, AUGUST 26, 1954:

Present for Company:	*Present for Union:*
J. E. Bolen	Van D. Jones
D. L. Golden	J. M. Herring
A. F. Smith	Pete Vines
J. R. Hudson	W. E. Lee, Jr.
	Perry Thompson
	Gus Dickerson

• • • •

It was agreed that the related departments, in accordance with Section 12—Seniority, would be the Truck Shop, Steel Construction, Welding, Steel Erection, Air Brake, Wood Erection, Paint and Shipping Track.

The matter of men holding seniority in two departments was discussed and it was agreed that such men would make their election as to what department they wanted to remain in within the period of 30 days after departmental seniority list posted.

• • • •

A. F. SMITH

PLAINTIFFS' EXHIBIT 96

SUPPLEMENTAL AGREEMENT
DATED AUGUST 26, 1954

In accordance with the wording in Section 12—Seniority—of the 1954 contract which reads in part: "Employees on the track or related departments (such departments to be determined by agreement between the Manager of Works and Local Union) already assigned ...."

The related departments shall be:

Truck Shop
Steel Construction
Welding
Steel Erection
Air Brake
Wood Erection
Paint
Shipping Track

UNITED STEELWORKERS OF AMERICA
LOCAL NO. 1466

/s/ Van D. Jones

/s/ J. M. Herring

/s/ Gus Dickerson

/s/ Perry Thompson

/s/ William P. Vance

/s/ W. H. Lee, Jr.

PULLMAN-STANDARD CAR MANUFACTURING

By: /s/ J. E. Bolen
Manager of Works

PLAINTIFFS' EXHIBIT 98

PULLMAN-STANDARD CAR MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

Bessemer, Alabama
September 18, 1956

SUBJECT: *United Steelworkers of America*

PLEASE REFER TO FILE *Contract Negotiations*

Memorandum of meeting held in Manager of Works' office at 2:00 P.M. Tuesday, September 18, 1956.

Present for Company:	Present for Union:
J. D. Doles	Van D. Jones
A. F. Smith	I. M. Herring
J. R. Hudson	Pete Vence
	Earl Walls
	Perry Thompson
	Gus Dickerson

The local union committee and their international representative met with the company for the purposes of carrying out the requirements of Section VI-B—Seniority, Section XI-O—Distribution of Overtime and Section XIV-A.—Holidays, of the new agreement between the parties.

The union was presented a supplemental agreement concerning local plant seniority. Such provisions contained therein had previous been discussed by Mr. Boles, the union representative and the local plant unions committee during negotiations in Chicago. The supplemental agreement was signed by the Manager of Works, all members of the local plant union committee and their international representative.

• • • •

PLAINTIFFS' EXHIBIT 101

United Steelworkers of America — Bessemer, Alabama

Production & Maintenance Employees

Local Union No. 1466 — August 26, 1959

CONTRACT NEGOTIATIONS

Memorandum of meeting held in Assistant Manager of Works' Office at 1:30 P.M. Wednesday, August 26, 1959.

Present for Company:	*Present for Union:*
R. J. Gorski	J. M. Herring
J. E. Bolen	Pete Vance
W. C. Horton	Earl Walls
A. F. Smith	Perry Thompson
J. R. Hudson	Gus Dickerson
Rupert Chisholm	

• • • •

10. MOBILE CRANE AND RAILROAD DEPARTMENTS—Union called for a combining of the above two departments. Union claimed that the infrequent use of the mobile crane operations was providing the older men in that department very little employment, and the combining of the two departments would give them more job security.

• • • •

PLAINTIFFS' EXHIBIT 102

PULLMAN-STANDARD CO.

SUBJECT United Steelworkers of America
Production & Maintenance Employees
Local Union No. 1466

Please Refer To File

CONTRACT NEGOTIATIONS
LOCAL ISSUES

Bessemer, Alabama
January 19, 1960

MEMORANDUM OF MEETING HELD IN SMITH'S OFFICE AT 3:30 P.M. TUESDAY, JANUARY 19, 1960

Present for Company:	*Present for Union:*
J. E. Bolen	J. M. Herring
W. C. Horton	Pete Vance
A. F. Smith	Earl Walls
J. R. Hudson	Perry Thompson
	Gus Dickerson

The Union submitted the following local issues in anticipation of reaching some satisfactory conclusion before major contract negotiations resumed in Chicago.

• • • •

2. Combining Mobile Crane Department with Maintenance Department—Mr. Bolen maintained that to combine the two departments would be doing an injustice to some of the older men in the maintenance department. After considerable discussion, the Union agreed with Bolen's position.

• • • •

JRH/es

PLAINTIFFS' EXHIBIT 103

P&M
Monday
August 13, 1962
10:30 A.M.

COMPANY:	*UNION:*
J. E. BOLEN	A. C. BURTTRAM
W. C. HORTON	RALPH ETHRIDGE
A. F. SMITH	EARL WALLS
J. R. HUDSON	JOHN PORTER
	GUS DICKERSON
	PERRY THOMPSON

LOCAL WORKING CONDITIONS—CONTRACT NEGOTIATIONS:

* * * *

Additional proposals submitted by Union on attached list.

* * * *

Gus Dickerson—should apply plant wide, including the erection tracks.

Talking about beginning of an order only.

Something should be included in agreement (Seniority); thinks Co. should have listed in seniority agreement the departments for seniority purposes.

Union interested and men asking for electricians, pipefitters, carpenters and whatever other craft jobs be separated and sub-dept. seniority within the mechanical department, in a sense, occupational seniority.

Dickerson—objects completely to No. 5, stating that in the past the Union has legislated some employees out of jobs by separating them into separate units.

* * * *

PLAINTIFFS' EX. 104

CONTRACT NEGOTIATIONS
P&M UNIT

LOCAL NO. 1466

Wednesday
Sept. 12, 1962
1:30 P.M.

Company:	Union:
Bolen	Burttram
Horton	Walls
Smith	Ethridge
Hudson	Porter
	Dickerson

1. LABOR POOL—Bolen: What is Union's position?

Buttram—Lets go back to local working conditions as agreed upon in last meeting.

A. #1 Beginning of Order (Seniority)

Bolen—Will continue to do what we have done in the past; boys know we do, when possible, give senior men preference.

Ethridge—Don't want iron clad rule; but want something where senior man will be given preference provided he can do the work.

Bolen—Won't work in shop.

Ethridge—Not what my understanding was in Chicago.

Bolen—[Made] no commitment; try to [indecipherable]

(Burttram agreed.)

It just won't work in this plant.

Burttram—Think it is bad when the same rule is not applied throughout the plant; understand in some depts. you do give preference to senior man.

Bolen—Would be changing jobs daily.

Ethridge—Would be a stipulation of over 100 cars before rule would apply.

Going to have turmoil if you don't give preference to senior man.

Not giving all senior men preference down the line.

Ethridge stated Electricians couldn't do job when he went on vacation. Bolen used this against Ethridge.

Two Stipulations

1. Once man pick job, have no preference to other jobs, stay on the job until completed.
2. Rule does not apply unless 100 cars or over.

Gus—Want rule to apply all over shop; if Welder picks his, want rivet driver to pick his.

Bolen—Talking about all depts.

[Indecipherable] . . . not any more, if work for . . . will have to work for Harry

Dickerson want all to have it or none.

Ethridge—Was sure misinformed; will get in black & white next time.

Burttram—Would be the last one to want to take away Mgt's decision on directing the work force; the Union might disagree sometime, when we take it up through the griev. procedure.

Gus & Perry—Think Weld Helpers should be given preference if Welders are allowed to pick their jobs.

Earl—Would you stress to your foremen to allow senior man preference.

Bolen—Where practicable; when possible; but the final decision is left up to Mgt.

Burttram—Still want you to do some work on this, we're not giving up.

* * * *

Ethridge—Fork lift operators—have half in one dept. and half in another dept. Think should all be on one list. Should have a home base. They're all under Mr. Sullivan on yard. Talking about Steel Stores and Misc. Stores Dept. when lift truck operators under same supervision. Not talking about men in lumber yard.

* * * *

Ethridge—Want the guards put back in Safety Dept.

Perry—Never been in Safety Dept. Will quit job before go in Safety Dept. Not going in it.

* * * *

PLAINTIFFS' EXHIBIT 105

CO	*UNION*	
BOLEN	WALLS	P&M
HORTON	ETHRIDGE	CONTRACT
SMITH	PORTER	NEGOTIATIONS
HUDSON	DICKERSON	(LOCAL)
	THOMPSON	1:30 P.M.

• • • •

Ethridge—How about Fork Lift Operators on one seniority list.

Bolen—Up to you boys how you want to work it.

Gus—Think should talk to the men involved; get them together & see what the majority want.

Bolen—Go ahead & make up your mind; get with Mr. Smith and write it up. We'll look it over when I get back and decide whether or not it would be acceptable from Mgt's standpoint.

• • • •

PLAINTIFFS' EXHIBIT 106

PULLMAN-STANDARD
INTER-DEPARTMENTAL CORRESPONDENCE

SUBJECT UNITED STEELWORKERS OF AMERICA
PRODUCTION AND MAINTENANCE
EMPLOYEES
LOCAL UNION NO. 1466

PLEASE REFER TO FILE

BESSEMER, ALABAMA

Memorandum of meeting held in Hudson's office at 9:00 A.M. Thursday, May 27, 1965

SUBJECT: Contract Negotiation of The Local Working Conditions Agreement Between Pullman-Standard, Bessemer Plant, and United Steelworkers of America, Local No. 1466.

PRESENT FOR COMPANY	*PRESENT FOR UNION*
J. R. Hudson	J. M. Herring
O. L. Johnson, Jr.	Earl Walls
Luke Charles	John Porter
F. A. Hasty	Guss Dickerson
J. F. Hull	Ross Hammonds

• • • •

PORTER: "I suggest you form a "labor pool" of all jobs from Job Class 1 through Job Class 6. Anybody can do the jobs in the Job Class 1 through 6. Anything over Job Class 6 would be filled only by a qualified employee."

DICKERSON: "What you have now is satisfactory to me."

• • • •

JOHNSON: . . . All Tool Room Employees should be on a separate seniority list.

HERRING: "We don't want that. The department would be too small. We did that with the Mobile Cranes and it doesn't work out."

• • • •

PLAINTIFFS' EXHIBIT 108

1965

DEPARTMENTS OF PULLMAN-STANDARD
HAMMOND, INDIANA PLANT

	Whites	Blacks
1. Die & Tool	76	2
2. Inspection	22	0
3. Janitors	2	1
4. Maintenance	37	2
5. Stores	10	0
6. Pattern & Template	1	0
7. Production Welding	51	3
8. Transportation	28	10
9. Automatic Welding	11	1
10. Tool Room	10	1
11. Poor Line	6	0
12. Fabricating	43	4
13. Crane Operator	15	3
14. Misc. Clerks & Timekeepers	3	0
15. Car Repair	75	18
16. Car Repair Welding	29	8
17. Wheel & Axle	3	3

PLAINTIFFS' EXHIBIT 109

PRODUCTION AND MAINTENANCE DEPARTMENT OF THE BESSEMER PLANT AS OF 1941

1. Superintendence Department

	White	Black
Janitor	0	2
Dispensary Aide	0	1
Laborer	0	1
Blue Print Operator	2	0
Tracer Clerk	1	0
Blue Print Boy	1	0
P.B.X. Oper & Stenographer	1	0
Co-Op Student	1	0
Inspector	1	0
Sample Car Man	1	0
Stenographer	1	0
	9	4
	Total	13

2. Plant Protection Department

	White	Black
Policeman	5	0
Extra Policeman	6	0
Clerk	1	0
Punch Operator Policeman	1	0
	13	0
	Total	13

3. Wood Mill Department

	White	Black
Hooker	0	1
Leader	2	0
Machine Operator	2	0
Helper	9	0
Gainer Operator	1	0
Helper & Craneman	1	0
Tool Room Man	1	0
	16	1
	Total	17

4. Lumber Yard Department

	White	Black
Inspector	1	0
Helper	24	0
Lumber Grader	1	0
Clerk	2	0
Machine Operator	1	0
	29	0
Total	29	

5. Wood Erection Department

	White	Black
Helper	21	24
Leader	1	0
Transfer Operator	1	0
Tool Room Man	2	0
Car Builder	9	0
Material Man	1	0
Helper & Car Builder	6	0
Nailer	12	0
Car Builder & Leader	1	0
Helper & Nailer	2	0
Extra Policeman Helper	1	0
Crane Operator & Helper	1	0
Craneman	1	0
Gang Leader	1	0
Fitter	0	1
Helper & Craneman	1	0
	61	25
Total	86	

6. Paint Department

	White	Black
Painter	0	2
Stock House Man	0	1
Sprayer	0	22
Helper	10	9
Heater	0	1
Stenciller & Cutter	1	0
Stenciller	2	0
Leader	2	0
Car Cleaner	11	0
Stencil Cutter	1	0
Tool Room Man	1	0
Cleaner	1	0
	29	35
Total	64	

7. Shipping Track Department

	White	Black
Helper	2	4
Bucker	0	1
Leader	1	0
Watchman & Air Tester	1	0
Air Brake Tester	1	0
Riveter	2	0
Car Builder	1	0
	8	5
	Total	13

8. Punch and Shear Department

	White	Black
Machine Operator	2	1
Shear Operator	0	4
Punch Operator	1	6
Helper	19	46
Laborer	0	2
Shearman	0	2
Fitter	0	2
Hooker & Helper	0	1
Leader	1	0
Spacer Operator	4	0
Burner	1	0
Pianola Operator	1	0
Checker	1	0
1st Helper Spacer	1	0
Crane Director	1	0
Night Leader	1	0
Heater	0	1
	33	65
	Total	98

9. Press Department

	White	Black
Helper	0	33
Press Oper & Night Leader	1	0
Press Operator	5	0
Operator	2	0
Learner	1	0
Machine Operator	1	0
Press Oper. Leader	1	0
	11	33
	Total	44

10. Steel Construction

	White	Black
Fitter	0	63
Bucker	0	7
Heater	0	10
Reamer	0	1
Heater & Bucker	0	1
Hooker	0	1
Helper	10	4
Leader	1	0
Gang Leader	1	0
Riveter	10	0
Tool Room Man	2	0
Learner	1	0
Riveter & Helper	8	0
Craneman & Helper	1	0
Tacker	3	0
Leader & Riveter	1	0
	38	87
	Total	125

11. Steel Erection

	White	Black
Heater	0	33
Fitter	0	172
Bucker	0	34
Sticker	0	3
Helper	1	6
Bucker Learner	0	1
Laborer	0	2
Hooker	0	6
Leader	7	0
Riveter	39	0
Pipefitter Helper	8	0
Tool Room Man	2	0
Pipefitter	8	0
Riveter Leader	2	0
Gang Leader	3	0
Helper Riveter	5	0
Learner	11	0
Riveter Inspector	1	0
Pipefitter Helper Riveter	1	0
Welder	1	0
Learner Riveter	1	0
Riveter Riveter C.W.	1	0
Tacker	1	0
	92	257
	Total	349

12. Welding Department

	White	Black
Welder	25	0
Welder Leader	1	0
Tacker	16	0
Burner	3	0
Tack Welder	4	0
Leader	1	0
	50	0
	Total 50	

13. Wheel and Axle Department

	White	Black
Wheel Roller Laborer	0	3
Wheel Roller	0	3
Axle Finisher Helper	1	0
Hooker	0	1
Helper Wheel Roller	0	3
Helper	1	1
Leader	2	0
Wheel Fitter	1	0
Rougher	2	0
Rougher Helper	1	0
Finisher Helper	1	0
Burnisher	1	0
Tool Grinder	1	0
Axle Finisher	2	0
Wheel Press Oper. Learner	1	0
Wheel Checker Wheel Mounter	1	0
Helper Wheel Borer	1	0
Craneman	1	0
Wheel Checker	1	0
Wheel Borer	1	0
Wheel Mtr Wheel Fitter	1	0
	20	11
	Total 31	

14. Truck Department

	White	Black
Truck Builder	0	11
Helper	0	3
	0	14
	Total 14	

15. Forge Department

	White	Black
Heater	0	4
Heater Blacksmith Helper	0	2
Hooker	0	1
Shearman	0	1
Helper	10	15
Black Smith Helper	0	2
Truck Builder	0	1
Bolt Threader Oper Helper	1	0
Blacksmith Machine Oper.	1	0
Machine Operator	3	0
Leader	2	0
Learner	2	0
Tool Temperer	1	0
Checker	1	0
Taper Roll Oper. Helper	1	0
Bull Dozier Oper.	1	0
Craneman	1	0
Helper Trimer Oper.	2	0
Machine Oper. Leader	2	0
Drill Press Oper. Bull Dozier	1	0
Blacksmith	1	0
Axle Finisher Helper	1	0
Blacksmith Machine Oper.	1	0
	32	26
	Total	58

16. Die & Tool Department

	White	Black
Hooker	1	1
Laborer	0	2
Die Man	1	0
Machinist	21	0
Apprentice	2	0
Planer Operator	1	0
Craneman	2	0
Die Man & Tool Room Helper	1	0
Welder	1	0
3 yr Apprentice	1	0
Planer Oper Die Man	1	0
Die Office Helper	1	0
Drill Press Operator	2	0
Tool Room Man	2	0
Tool Room Helper	1	0
Drill Press Oper Die Man	1	0
Handy Man	3	0
Leader	1	0
Co-Op Student	1	0
Welder Learner	1	0
Die Man	10	0
Helper	2	0
Tool Man	1	0
	58	3

Total 61

17. Template Department

	White	Black
Template Maker	1	0
Apprentice	2	0
	3	0
	Total 3	

18. Maintenance Department

	White	Black
Handy Man	1	1
Oiler	0	2
Oiler Laborer	0	1
Switchman Helper	0	1
Switchman	0	2
Laborer Switchman	0	2
Laborer	0	2
Hooker Switchman	0	1
Section Laborer	0	1
Power House Oper.	4	0
Electrician	16	0
Leader	3	0
Armatur Winder	2	0
Pipefitter	8	0
Millwright	10	0
Engineer	1	0
Locomotive Engineer	1	0
Rigger	2	0
Boiler Fireman	3	0
Boiler Oper.	1	0
Cable Splicer	1	0
Carpenter	1	0
Brickmason	1	0
Co-Op Student	1	0
	57	13
	Total 70	

19. Steel Miscellaneous Department

	White	Black
Craneman Hooker	0	7
Craneman	1	2
Rivet Man	0	1
Hooker	0	35
Crane Operator	0	1
Helper	0	7
Laborer	0	14
Tractor Driver	0	2
Craneman Laborer	0	1
Fitter	0	3
Leader	1	0
Helper Crane Operator	1	0
Crane Director	2	0
Hooker Crane Oper.	1	0
Bucker	0	1
	6	74
	Total	80

20. Stores Department

	White	Black
Truck Driver	0	1
Store House Man	1	0
Unloading Forman	1	0
Stenographer	1	0
Helper	1	0
Clerk Store House Attendant	1	0
Clerk	1	0
	6	1
	Total	7

PULLMAN STANDARD CAR MANUFACTURING COMPANY
BESSEMER PLANT

February 24, 1942

RATE COMPARISONS—PULLMAN AND T. C. I & R. R.

OCCUPATION	COL. *	PULLMAN HOURLY	PULLMAN PIECEWORK	T. C. I & R. R. HOURLY
Machinist	W	.725 to 1.01	none	.925 to 1.07
Welders (Elect)	W	.65 Start .70	.865	.80 to .97
Electricians	W	.665 to .90	none	.92 to 1.07
Riveters	W	.65 Start .75	1.055	.81
Buck-Heat-Fit	C	.485 Start .51	.66	.595
Punch & Shear Op	C	.485	.625	.70 (White)
" " Helper	C	.485	.575	.58 to .60
Spacer Operator	W	.645	.955	.955
Spacer Helper	W	.585	.75	.775
Blacksmiths	W	.645 to .885	.865	.92 to 1.07
Blacksmith Help	C	.52 to .56	.595	.60 - .65 - .70
Axle Rough & Fin.	W	.645	.955	.58 Guarantee 1.305 P.W. Base
Crane Operator	W	.63 to .66	none	.695
Crane Operator	C	.525	.625	.61
Press Operator	W	.585	.865	none
Press Helper	C	.485	.595	none
Wood Car Build	W	.625	.865	.67 to .945 (Carp)
Painters	C	.485	.625	.67 to .89 (White)
Millwrights	W	.665 to .90	none	.81 - .91 & .97
Template Maker	W	.775 to .90	none	1.145 to 1.19 (Pattern makers)
Laborers	C	.485		.55

PLAINTIFFS' EXHIBIT 111

252

PULLMAN STANDARD CAR MANUFACTURING COMPANY
BESSEMER PLANT

February 24, 1942

RATE COMPARISONS—PULLMAN AND NASHVILLE BRIDGE CO.

OCCUPATION	COL.	PULLMAN		NASHVILLE BRIDGE COMPANY
		HOURLY	PIECEWORK	HOURLY
Machinist	W	.725 to 1.01	none	.98 to 1.08
Welders (Electric)	W	.65 Start .70	.865	.84 to 1.06
Electricians	W	.665 to .90	none	1.05
Riveters	W	.65 Start .75	1.055	.95 to 1.00
Buck-Heat-Fit	C	.485 Start .51	.66	.52 to .62
Punch & Shear Oper	C	.485	.625	.60 to .78 (White)
Punch & Shear Helper	C	.485	.575	.44 to .54
Spacer Operator	W	.645	.955	.88
Spacer Helper	W	.585	.75	.47 to .60
Blacksmiths	W	.645 to .885	.865	.96 to 1.05
Craneman	W	.63 to .66		.75
Wood Car Builders	W	.625	.865	.56 to .86 (Carp)
Painters	C	.485	.625	.53 to .65
Millwrights	W	.665 to .90	none	.96
Labor	C	.485		.40 White .39 Col.

COMPANY EX 8—FIRST DOCUMENT

U. S. W. A. (CIO)

BESSEMER—Feb. 16, 1943

Meeting with Bargaining Committee:

A meeting was held with United Steel Workers of America at 10:00 A. M. this date present were:

For the U. S. W. A.

V. F. Gage, District Representative
Robert F. Aldridge (w) Punch & Shear Dept.
McKinley McCreary (c) Track
Perry L. Thompson (c) Punch & Shear Dept.
Frank Zeigler (c) Bomb Dept.

For the Company:
W. C. Sleeman
O. A. Wiltsie

* * * *

Mr. Aldridge asked if he could bring up a question as to the rate classification, and a general discussion followed as to various types of work being done in Punch & Shear Department. The colored members also entered into the discussion.

* * * *

COMPANY EX. 8—SECOND DOCUMENT

Report of men who reported for work and worked January 10, 1944

Report of men who failed to report for work on January 10, 1944

Report of men who reported and struck January 10, 1944

	Departments Represented by C.I.O.	I.A.M.	I.B.E.W.	TOTAL
	Reported for work and worked—			
white	257	118	14	389
colored	176	2	0	178
Total	433	120	14	567
	Did not report for work—			
white	37	16	2	55
colored	212	2	0	214
Total	249	18	2	269
	Reported for work and struck—			
white	0	0	0	0
colored	61	0	0	61
Total	61	0	0	61

Pullman-Standard Car Mfg. Co.,
Bessemer, Alabama Plant
January 11, 1944

COMPANY EX. 8—THIRD DOCUMENT

Bessemer, Alabama

May 16, 1947

SUBJECT: *CIO Contract Negotiations.*

Memorandum of meeting held in the Manager of Works office, Bessemer Plant at 1:30 P.M., Tuesday, May 13, 1947.

Present for Company:	*Present for Union:*
D. L. Golden	B. F. Gage, Field Representative
W. C. Sleeman	J. M. Herring, Shop Committeeman
J. E. Bolen	John Hubbard, Shop Committeeman
A. F. Smith	Roy Blankenship, Shop Committeeman
	Perry Thompson (c), Shop Committeeman
	Gus Dickerson (c), Shop Committeeman

* * * *

The question of seniority was then discussed at length, the Union wanting seniority for promotions. Mr. Golden explained that such would not work at this plant and would not agree to the request. Dickerson favored occupational seniority and to this Mr. Golden stated that the Company would not object. * * *

* * * *

COMPANY EX. 9—FIRST DOCUMENT

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY
INTER-DEPARTMENT CORRESPONDENCE

SUBJECT: UNITED STEELWORKERS OF AMERICA
SENIORITY

Please Refer To File

Bessemer, Alabama

September 9, 1954

MEMORANDUM OF MEETING HELD IN SAFETY CONFERENCE ROOM AT 2:30 P.M. THURSDAY, SEPTEMBER 9, 1954.

Present for Company:	*Present for Union:*
W. C. Horton	J. M. Herring
A. F. Smith	Gus Dickerson
J. R. Hudson	Pete Vance
L. G. Hintermeier	(9 inspectors)
Leon Caldwell	

The purpose of this meeting was to discuss the seniority provision under the new 1954 agreement and to what effect it would have on the inspectors in the Inspection Department.

Herring stated that the only way he could interpret the contract was the man with the age stayed, provided he had the ability to perform the work.
Horton stated that considering A, B and C factors, the oldest man would have preference

Herring maintained that the company had to give the man a trial at the job, if he said he had the ability to do the work. He further stated that he understood the company was not running a school and the union would

agree, and he thought one day would be sufficient to find out whether a man had the ability to perform the work.

Horton asserted that when a man refused to take a job on the basis of not having the ability to perform the work, he would not have to be considered again for the job.

Dickerson agreed.
Meeting adjourned at 3:30 P.M.

A. F. SMITH

JRH/es

cc: Messrs. W. C. Sleeman
J. E. Bolen

COMPANY EX. 9—SECOND DOCUMENT
(UNION PROPOSAL OF 8/13/62)

1. At the beginning of a Job, Track or line senior men within that department in respect to his job classification shall be given preference wherever possible as to job.
2. Wherever possible senior men shall be given preference as to shift.
3. Rates are to be studied on all new equipment, jobs and new manufacturing methods or general production conditions.
4. Drink Boxes, Coffee, milk and sandwich machines be placed throughout the plant.
5. All trade or craft jobs be placed on separate seniority list.
6. Copies of the local working conditions be placed in the up coming contract. (as attached sheet)

Submitted by Union 8-13-62

COMPANY EX. 10—FIRST DOCUMENT

(CO. PROPOSAL OF 1/19/62)

• • • •

SECTION 6. SENIORITY

It is understood and agreed that in all cases of increase or decrease of forces—the following factors shall be considered and where factors "b", "c" and "d" are relatively equal, length of continuous service shall govern:

a. Continuous service;
b. Ability to perform the work;
c. Efficiency;
d. Physical fitness.

In taking into consideration an employee's skill, ability and efficiency, the Company may consider his qualifications in the department in which he is then working as well as his qualifications as to other work in the same department, and other departments, and the advisability of retaining him because of his diversified skill, ability and efficiency.

Seniority shall cease upon (a) discharge; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company employment records; (d) lay-off of one or more years duration.

New employees are on probation for six months, during which time they may be laid off or discharged as exclusively determined by the Company.

No employee shall hold seniority in more than one department. However, the Company reserves the right under reduced operations or shut-down, to retain such employees as will best fit the Company's needs. Under such conditions there will be no restrictions as to the kind of work performed by leaders, foremen or force retained.

• • • •

COMPANY EX. 10—SECOND DOCUMENT

MEMORANDUM OF CONFERENCE

AF of L Machinists #5

Bessemer, Alabama,
January 22, 1942

A meeting was held with the bargaining committee of the A. F. of L. Machinists, beginning at 9:10 A.M.

Those representing the Association were:

J. H. Howard
J. D. Baumgardner
A. H. Raines
O. L. Johnson
L. H. Clymore

Those representing the Company were:

W. C. Sleeman
F. W. Green
J. E. Bolen
O. A. Wiltsie

Mr. Sleeman handed to committee three sheets of the proposed contract in which certain changes had been made in some of the sections in line with the discussion at previous meeting.

Seniority A good bit of time was spent in discussing this section, the committee taking the position that the company's provision for use of employees when running small lots of cars or shut-down nullified the seniority. Mr. Sleeman explained in detail the purpose of such a provision and asked the committee to submit a counter-proposal if they could work out something to cover such condition. The committee contends that they want straight departmental seniority.

• • • •

COMPANY EX. 10—THIRD DOCUMENT

Memorandum of Conference

AF of L Machinists—#6 Bessemer, Alabama, January 30, 1941

A conference was held with the bargaining committee of the AF of L Machinists at the general office this date, beginning at 2:15 P.M.

Mr. W. C. Finch, of the U.S. Conciliation Service was present.

Those representing the Union were:

J. H. Howard
J. D. Baumgardner
A. H. Raines
O. L. Johnson

Those representing the Company were:

W. C. Sleeman
F. W. Green
J. E. Bolen
C. A. Wiltsie

The meeting opened with Mr. Howard stating that the committee had asked Mr. Finch of the Conciliation Service to come to the conference due to the fact that at last conference certain items of proposed contract could not be agreed upon between company and the Association.

A discussion took place concerning the following on which agreement had not been reached:

Seniority—The committee contends that the last clause of this section as offered in company counter-proposal nullifies seniority. Mr. Sleeman explained the purpose of the clause and stated that the company wanted the right under shut-down and running small lots to apply this provision. Noted by conciliator as not agreed on.

* * * *

COMPANY EX. 12—FIRST DOCUMENT

MEMORANDUM OF CONFERENCE

No. 1-

Bessemer, Alabama,

November 26th, 1941

A conference was held in the General Office on November 26th, at 4:40 P.M. with the representatives of the CIO Bargaining Committee.

Those representing the Union were:

W. H. Crawford
W. M. Sheffield
L. R. Smith
McKinley McCreary)
Gus Dickerson) Colored

Those representing the Company were:

W. C. Sleeman
F. W. Green
J. E. Bolen
O. A. Wiltsie

The Committee presented a contract, stating that it was a copy of the contract which had previously been submitted to Bessemer Plant. * * *

* * * *

SECTION 6—SENIORITY It is understood and agreed that in all cases of promotion the following factors shall be considered, and where (b) and (c) are relatively equal, length of continuous service shall govern:

(a) Continuous service
(b) Ability to perform the work
(c) Physical fitness

In increasing and decreasing the forces employees shall be laid off or reemployed in the same position as they entered the services of the company, that is, the youngest employee shall be laid off first, continuing on down the line. If and when business picks up they shall be reemployed in the order in which they were laid off, that is, the oldest man in point of service with the company shall be reemployed first, continuing on through the list until the first man laid off would be the last man returned to work. There shall be no employment of new men until all previous employees laid off have been given an opportunity of returning to work.

* * * *

COMPANY EX. 12—SECOND DOCUMENT

Bessemer, Alabama
December 9, 1941

SWOC CONTRACT

MR. W. N. BARKER:

* * * *

Under the heading of Seniority they have asked the insertion of a portion of the last paragraph Section 6 reading, "No employee shall hold seniority in more than one department." We have inserted for counter proposal to them the balance of this paragraph which reads, "However, company reserves the right under reduced operations or shut-downs to retain such employees as will best fit company needs." Incidentally, this latter part of the paragraph, we think, is also covered by the second paragraph of this Section 6.

* * * *

W. C. SLEEMAN

COMPANY EX. 12—THIRD DOCUMENT

STEEL WORKERS ORGANIZING COMMITTEE
Third Floor Steiner Building
Telephone 3-3937
Birmingham, Alabama

Noel R. Beddow,
Executive Director

William Mitch,
Regional Director

January 7, 1942

Mr. W. C. Sleeman, General Manager
Pullman-Standard Car Manufacturing Co.
Bessemer, Alabama

Dear Sir:

Enclosed you will find copy of the counter proposal that Mr. Beddow promised you at our last meeting.

We would like to request a meeting for Saturday, January 10, at 9:00 A. M. for the purpose of considering the various proposals. I feel that we can make this a final meeting in view of the discussions that have taken place.

Very truly yours,

/s/ W. H. Crawford
W. H. CRAWFORD
Representative

WHC/ww

* * * *

SECTION 6—SENIORITY—It is understood and agreed that in all cases of promotion the following factors shall be considered, and where (b) and (c) are relatively equal, length of continuous service shall govern:

(a) Continuous service
(b) Ability to perform the work
(c) Physical fitness

In increasing and decreasing the forces, employees shall be laid off or reemployed in the same position as they entered the serv e company, that is, the youngest employee shall be laid off f tinuing on down the line. If and when business picks up they shall be reemployed in the order in which they were laid off, that is, the oldest in point of service with the company shall be reemployed first, continuing on through the list until the first man laid off would be the last man returned to work. There shall be no employment of new men until all previous employees laid off have been given an opportunity of returning to work.

No employee shall hold seniority in more than one department. Any employee who shall leave the employ of the Company at any time during the existence of the Agreement, or any extension thereof, because of being called or, or volunteering for, the United States Military or Naval Service in time of emergency shall, upon his return from such service, be restored to his former position or a position of like seniority and pay, unless the position of the Company has so changed as to make this impossible, on the basis of his seniority without any loss of accumulated seniority right.

* * * *

COMPANY EX. 12—FOURTH DOCUMENT

MEMORANDUM OF CONFERENCE

No. 2

Bessemer, Alabama
November 29th, 1941

A conference was held in the General Office on November 29th, at 9:15 A. M. with the representatives of the CIO Bargaining Committee.

Those representing the Union were:

W. H. Crawford
W. M. Sheffield
L. R. Smith
McKinley McCreary)
Gus Dickerson) Colored

Those representing the Company were:

W. C. Sleeman
F. W. Green
J. E. Bolen
O. A. Wiltsie

Counter proposals were submitted to the Committee covering each of the sections in the contract they had presented. These proposals and changes were discussed in detail. Mr. Crawford asked that the wage question be passed over at this meeting, and he also stated that the Committee wished to withdraw section 13 of their proposed contract, pertaining to closed shop. They will submit a new proposal containing the Union Maintenance Clause.

Mr. Sleeman gave Mr. Crawford typewritten copies of the counter proposals offered by the company, and for the Vacation Clause he handed Mr. Crawford a copy of

the Company's Pamphlet "Vacation Plan for Hourly and Piecework Employees", dated July 14, 1941.

Next meeting is to be at General Office on Saturday morning December 6th, at 9:00 o'clock.

Adjournment—12:15 P. M.

• • • •

SECTION 6. SENIORITY

It is understood and agreed that in all cases of increase or decrease of forces—the following factors shall be considered and where factors "b", "c", "d" and "e", are relatively equal, length of continuous service shall govern:

a. Continuous service;
b. Ability to perform the work;
c. Efficiency;
d. Physical fitness;
e. Family status; number of dependents.

In taking into consideration an employee's skill, ability and efficiency, the Company may consider his qualifications in the department in which he is then working as well as his qualifications as to other work in the same departments, and other department and the advisability of retaining him because of his diversified skill, ability and efficiency.

Seniority shall cease upon (a) discharge; (b) voluntary quitting; (c) after having been laid off and the employee does not return to work within ten (10) days after notice is sent to the address according to the Company employment records.

New employees are on probation for six months, during which time they may be laid off or discharged as exclusively determined by the Management.

• • • •

COMPANY EX. 12—FIFTH DOCUMENT

MEMORANDUM OF CONFERENCE

S. W. O. C. #6.

Bessemer, Alabama
January 10, 1942.

A meeting was held with the S. W. O. C. bargaining Committee at the General Office January 10, 1942 at 9:15 A. M. (Saturday)

Those representing the Union were:

W. H. Crawford
W. R. Sheffield
L. R. Smith
McKinley McCreary)
Gus Dickerson) Colored

Those representing the Company were:

W. C. Sleeman
F. W. Green
J. E. Bolen
O. A. Wiltsie

When the conference opened Mr. Sleeman explained that he had a Court Reporter present to take down the preliminary statement of the meeting, after which the reporter would retire. Mr. Sleeman stated that the proposed contract received from the Union on January 8th which was submitted as a counter-proposal to what had been offered by the Company is practically a duplicate of the proposal originally submitted by the Union. He further stated that he did not understand this being submitted as counter-proposal when it ignored all of the points and sections upon which an agreement had been reached during the five conferences held for purpose of negotiating a contract. Mr. Sleeman further stated the Company had kept all appointments, had arranged for

proper and complete attendance of company representatives at all meetings. However, he stated the Union had postponed a meeting and for another appointed meeting the Committee had failed to show up and waited two days to telephone reason for not keeping the appointment. Mr. Crawford stated he took the responsibility for these failures. Mr. Sleeman asked Mr. Crawford if he had anything to say to be incorporated in the statement—Mr. Crawford replied that he had no remarks to make.

The reporter then retired from the meeting.

Mr. Sleeman then stated that he was unable to understand the submitting as a counter-proposal what amounted to a duplicate of the proposal which the Union had originally submitted and over which first meeting was held on November 26, and failure of the Union to take into account the items that had been tentatively agreed on at various meetings. Mr. Crawford stated that the proposal contained many of the items agreed upon, and Mr. Sleeman replied that agreement had been reached on practically half the provisions of the tentative proposal. However, he stated that he would again go over the details of the Union proposed contract by sections, and made the following comment:

• • • •

Section 6—Seniority

Mr. Sleeman asked the committee to consider the seniority section as offered by the company for the reason that it is more applicable to this plant. Also the Union's military clause was discussed, and Mr. Sleeman stated he was of the opinion this company would line up with other corporations in giving consideration to reemploying men who had served in military forces.

• • • •

SECTION 6. SENIORITY

It is understood and agreed that in all cases of increase or decrease of forces—the following factors shall be considered and where factors "b", "c" and "d" are relatively equal, length of continuous service shall govern:

a. Continuous service;
b. Ability to perform the work;
c. Efficiency;
d. Physical fitness.

In taking into consideration an employee's skill, ability and efficiency, the Company may consider his qualifications in the department in which he is then working as well as his qualifications as to other work in the same department, and other departments, and the advisability of retaining him because of his diversified skill, ability and efficiency.

Seniority shall cease upon (a) discharge; (b) voluntary quitting; (c) after having been laid off the employee does not return to work within ten (10) days after notice is sent to the address according to the Company employment records.

New employees are on probation for six months, during which time they may be laid off or discharged as exclusively determined by the Company.

No employee shall hold seniority in more than one department. However, the Company reserves the right under reduced operations or shut-down, to retain such employees as will best fit the Company's needs. Under such conditions there will be no restrictions as to the kind of work performed by leaders, foremen or force retained.

• • • •

SECTION 6—SENIORITY It is understood and agreed that in all cases of promotion the following factors shall

be considered, and where (b) and (c) are relatively equal, length of continuous service shall govern:

(a) Continuous service
(b) Ability to perform the work
(c) Physical fitness

In increasing and decreasing the forces, employees shall be laid off or reemployed in the same position as they entered the service of the company, that is, the youngest employee shall be laid off first, continuing on down the line. If and when business picks up they shall be reemployed in the order in which they were laid off, that is, the oldest in point of service with the company shall be reemployed first, continuing on through the list until the first man laid off would be the last man returned to work. There shall be no employment of new men until all previous employees laid off have been given an opportunity of returning to work.

No employee shall hold seniority in more than one department. Any employee who shall leave the employ of the Company at any time during the existence of this agreement, or any extension thereof, because of being called or, volunteering for, the United States Military or Naval Service in time of emergency shall, upon his return from such service, be restored to his former position or a position of like seniority and pay, unless the position of the Company has so changed as to make this impossible, on the basis of his seniority without any loss of accumulated seniority right.

* * * *

COMPANY EX. 13—FIRST DOCUMENT

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

SUBJECT: C.I.O.—CONTRACTS

PLEASE REFER TO FILE

Bessemer, Alabama
April 4, 1952

MR. N. B. JOHNSON:

No doubt Smith's department is making a comprehensive study in setting out comparative information between our different existing contracts and in this connection we observed in a recent "Mill and Factory" magazine, a very good article entitled "What Your Union Contract Should Cover". There is also included in this article, a contract bargaining check list. We started to analyze Bessemer's particular contract applying this check list but we take it from the trend of things that this year's contract will not be handled locally in the same manner as previously done.

• • • •

We suggest that seniority be kept as we have it in Bessemer; that is, occupational seniority by departments (this being requested by the Union some few years ago).

• • • •

COMPANY EX. 13—SECOND DOCUMENT

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

SUBJECT: Seniority—U.S. Steel, Republic Steel, Inland Steel, Youngstown Steel

PLEASE REFER TO FILE

July 22, 1952

MR. ROBERT C. SMITH:

I have checked with the above companies regarding the operation of their seniority clauses and have been informed as follows.

U. S. STEEL—The master contract sets forth the basis for accumulating seniority and also the reasons under which seniority is broken. Each plant negotiates its own seniority agreement covering promotions, demotions, increases and decreases in forces. At South Works for example, they have seniority units which comprise several occupations and within a department they may have as many as five or six units. They do not have plant-wide seniority. They do have, however, a setup whereby men being laid off with three years' or more service are placed on the labor seniority list according to their plant-wide seniority and such employees may displace Laborers throughout the plant having less plant-wide seniority.

REPUBLIC STEEL—Republic is very much like U. S. Steel except that they do have a labor pool into which laid off men are placed so that when men are needed in departments other than from which they are laid off, the men with the longest plant seniority are placed on temporary jobs or used to fill in for absentees in the various departments.

INLAND STEEL—Inland has more or less the same setup as U. S. Steel in that they have seniority units which might comprise as many as six departments and it is possible that each unit might have as many as ten or twelve occupations therein. They do not have plant-wide seniority and only when there is a general depression in the *steel industry* does departmental seniority apply. In the skill trades, however, they do have occupational seniority within the department.

YOUNGSTOWN STEEL—At Youngstown, as in the above three companies, each plant of the company has its own seniority setup, and at the South Chicago plant it is operated on a departmental basis. In reduction of forces, however, the occupation affected is the first to be reduced and then if the employee has more departmental seniority than others in a lower rated occupation, then such affected employees exercise departmental seniority. In this plant, they do have a labor pool which operates the same as at Republic.

At all of the above mentioned plants, ability and physical fitness are the governing factors, and only where such factors are relatively equal does length of continuous service govern.

D. L. GOLDEN

COMPANY EX. 13—THIRD DOCUMENT

PULLMAN-STANDARD CAR MANUFACTURING COMPANY

INTER-DEPARTMENT CORRESPONDENCE

SUBJECT:
PLEASE REFER TO FILE

August 14, 1952

MR. ROBERT C. SMITH:

Attached are separate memoranda covering my review of the labor agreements at Butler, the two Hammond Plants and Worcester as per your memorandum of August 11.

/s/ RJG
R. J. GORSKI

RJG:cs
Attachments

BUTLER PLANT

There have been a large number of grievances at this plant under the current agreement. We have gone to arbitration in 24 cases, and we are currently preparing to go to arbitration in another three cases. Most of the grievances involved questions of ability under the seniority provisions, disciplinary action, overtime assignment, vacations, and tasks.

A review of this agreement in the light of experience with respect to these grievances as well as the remaining provisions of the agreement which might cause conflict in the future, indicates the following desirable changes:

1. *Seniority*—The Union at this plant has continually challenged Management's application of the ability qualification under this provision. The main source of difficulty in this respect centers in the Electrical Department and in the Punch, Shear and Press Departments. The Electrical Department seniority list has for a long number of years included Cranemen. This serves as a basis for dispute whenever an electrician vacancy occurs and Management fill such vacancy by hiring a qualified electrician. The Union insists, not only because of the seniority list, but because of past practice, that senior Cranemen should be given preference in filling Electrician vacancies. The exclusion of Cranemen from the Electrical Department seniority list has been attempted without success on several occasions in the past. It should be attempted again.

As to the Punch, Shear and Press Department, the Union has sought to apply a provision in the seniority clause which gives preference to senior employees at the start of a job, track, or line whenever a senior employee completes an item of work in any of these departments. Because many items worked on in these departments are completed in a relatively short period of time, any ar-

rangement that would permit employees to exercise their seniority to place themselves on different machines after completing each item could lead to disruptions in the flow of work which would in turn affect production throughout the shop. This undesirable provision is contained in paragraph 7 of the seniority clause. Every effort should be made to eliminate it, or to clarify it in order to avoid conflict in those areas where its application is completely impossible.

Overtime, Saturday and Sunday work are distributed under various types of seniority arrangements in the different departments. Some departments use seniority alone as a basis for distributing such work, some rotate, while others provide that if an employee's job works he works, with all other overtime being distributed according to seniority or rotation. A number of grievances have originated due to the fact that these overtime distribution arrangements have not been complied with, or have been complied with, but have not been carried out solely because of employee failure to report as scheduled. For example, the Union insists that when a group of employees have been scheduled for overtime work according to their applicable overtime distribution agreement, Management is obligated to follow seniority in rearranging the work force or filling in vacancies if employees properly scheduled for such work fail to report for the overtime assignment. We should have a detailed understanding to cover the various ramifications of overtime assignments which are not now set forth in writing and subject to perpetual dispute.

Our people at Butler have suggested certain other changes in the seniority provision, but a number of these suggestions, I believe, stem from administration difficulties rather than principle or operating difficulties. These administration difficulties, I believe, could be ironed out satisfactorily without attempting to eliminate basic pro-

visions which are not, in my opinion, the source of difficulty in these particular areas.

2. *Disciplinary Action*—The Union's objection to disciplinary action stems from its contention that there is no set of rules to guide an employee in his conduct so that he might avoid penalty. A demerit slip system which has been in use for a number of years is not recognized by the Union for the reason that there is no cut-off or terminal point; that is, an employee who is warned against a further violation of some rule via a demerit slip is subject to layoff or discharge in the event of a subsequent violation even though it might occur a year or more after the first offense. In the case of demerits for absenteeism, for example, the Union points to innumerable cases where demerits have not been issued in the case of key employees. The Union contends that this is discrimination and that before it will recognize the merit system there will have to be a specific agreement regarding the issuance of demerits and all penalties for violation of agreed upon rules will have to be administered uniformily.

3. *Vacations*—The vacation provision under this agreement incorrectly bases eligibility for two weeks vacations on the "receipt of earnings" in 60 per cent of the pay periods, etc. This language should be made consistent with the language which applies to employees qualifying for one week and three week vacations where the eligibility is based on the performance of *work* in 60 per cent of the pay periods.

Our Butler people have expressed dissatisfaction with the present provision concerning the calculation of vacation pay. Vacation pay under the present contract is calculated on the basis of the employee's average straight time hourly earnings during the two closed and calculated pay periods immediately preceding the employee's vacation. This basis presents a problem whenever it is

necessary to deny an employee's request for a particular vacation period because of the possibility of a variation in earnings. Employees are reluctant to take a vacation when their earnings are low, which is the time when we can usually spare them more readily then when their earnings are high, which is the time when employees would like to take their vacation. In order to avoid this problem, our Butler people have suggested that vacation pay be based on the employee's average hourly earnings during the 12 months preceding the employee's vacation or during the preceding calendar year with provision for adjusting such average rate in the light of any intervening increases. At Michigan City, we use the percentages of the preceding year's earnings, but we do not adjust such amounts in the light of intervening wage increases.

4. *Task*—The present task clause in this agreement has thus far served well to protect us in the disputes which have arisen relating to task. For this reason, it seems quite likely that the Union will make a strong effort to either revise or eliminate it.

5. *Military Clause*—This clause should be revised to conform with the present Selective Service Act. It now refers to the act of 1940.

HAMMOND CAR PLANT

We have had relatively few grievances at this plant. The grievances which did arise did not originate out of any ambiguity under the contract. As a matter of fact in all of the cases I have had occasion to handle, the contract served us well in maintaining our position.

Regarding provisions in the agreement that might be modified, changed, amended or eliminated entirely to our advantage, the following is submitted for consideration:

1. *Recognition*—The current bargaining unit by its inclusion of "factory clerks" covers timekeepers. Several months ago John Russell raised a question as to whether it would be possible to have timekeepers eliminated from the bargaining unit because it is planned to have them placed on a salary basis and otherwise change their duties, making it undesirable to have them included in the bargaining unit. A job description for use as a basis in determining whether we could present a sound case in an effort to have this classification removed from the unit was requested of Russell by Mr. Shane. To my knowledge, this job description has not been submitted as yet. This matter should be taken up and resolved among ourselves before a new contract is negotiated so that if there is any good basis for excluding this classification, it can be done at the proper time.

2. *Wages*—Paragraph 3 provides that where a production item is to be made on a production day-rate basis, the hourly day rate is to be established by using the day rate of the occupation and adding to it 60 per cent of the difference between the day rate and the piece work expectancy rate. A number of months ago Messrs. Trautman and Wulff implied that this provision was undesirable from Management's viewpoint. We should have the facts as to why this provision is undesirable to our plant people and their recommendation concerning a change in this provision or an elimination thereof.

3. *Vacations*—The vacation provision in this contract, as is the case at the Wheel Foundry, Butler and Worcester, contains reference to the "receipt of earnings" with respect to employees who have seniority of five years. This should be corrected to conform with the requirement that an employee must *work* in at least 60 per cent of the pay periods as provided with reference to one year and twenty-five year employees.

4. *Grievances*—Step E of the grievance procedure which provides for referring unsettled grievances to arbitration should contain a time limitation. Under the present language, the Union is not required to request referral of an unsettled grievance to arbitration within a specified period of time. In our Butler contract, for example, the Union must notify the Company within five days after the discussion of the grievance in the final step between the parties as to whether it desires to proceed to arbitration.

5. *Military Clause*—The current military clause refers to the Selective Service Act of 1940 and also provides for leaves of absence to employees entering the U. S. Maritime service. This provision, of course, should be revised to conform with the current Selective Service Act.

6. *Termination*—This clause now contains a provision similar to the General Motors catch-all provision to protect us against having to negotiate at the pleasure of the Union with respect to any matter of wages, hours of work, and working conditions not specifically covered within the contract. However, you may wish to consider substituting the G.M. language for the current language in this contract.

HAMMOND WHEEL FOUNDRY

We have had relatively few grievances at this plant. The grievances which did arise did not occur as the result of any contract defects. In all of the cases I have had occasion to handle at this plant, the contract served well to maintain our position.

Regarding provisions in the agreement that might be modified, changed, amended, or eliminated entirely to our advantage, I suggested the following points for consideration:

1. *Grievances*—Step E of the grievance procedure which covers the submission of unsettled grievances to arbitration should require the Union to submit its request for arbitration within a specified period of time.

2. *Military Clause*—The military clause should be revised. It refers now to the Selective Service Act of 1940.

3. *Vacations*—The provision in this clause referring to employees qualifying for two week vacations should be revised to eliminate reference to the "receipt of earnings." This language should be made consistent with the language applied to employees qualifying for one week and three week vacations which language refers to the performance of *work*.

4. *Termination*—The final paragraph of this provision is similar to the G.M. provision which eliminates any obligation to negotiate with the Union during the term of the contract on any matters of wages, hours of work and working conditions not specifically covered by the agreement. You may, however, wish to substitute the G.M. language for this current provision.

WORCESTER

The number of grievances at this plant have been large with the emphasis being on questions of seniority. Another sizable group of grievances at this plant have concerned the matter of wages; these, of course, are not questions which resulted from any contract failure, but rather because of this Union's insistance on using the grievance procedure as a method of negotiating wage rate increases.

A review of this agreement indicates the following desirable changes:

1. *Seniority*—Plant-wide seniority is provided for under this agreement and disputes occur whenever forces are increased or decreased due to the fact that this

Union challenges all applications of the ability factor. This is true even though the current agreement provides for the consideration of seniority in any increase or decrease in force where the employee "has the necessary skill and ability to perform the work involved." The use of the term "necessary skill and ability" is stronger than in our other contracts where the simple term "ability" applies. There was some indication for a short period during discussion of seniority grievances, that International Representative Brennan might be willing to agree that the application of ability would be based on the Company's records; i.e., if an employee's record shows that he has satisfactorily performed like or similar work for the Company at some previous time, such employee would be considered as having ability to perform the work involved. Some effort should be made in negotiating a new contract to clarify the matter of ability.

2. *Vacations*—The same incorrect terminology that appears in the Butler and Hammond agreements with respect to employees qualifying for two week vacations (use of the term "earnings" instead of "work") appears in the vacation clause in this contract.

3. *Termination*—The termination provision in this agreement does not contain any language to prevent the Union from bringing up for negotiation during the life of the contract, any matter not specifically set forth in the agreement. The G. M. clause or something similar to it should be included in this contract.

COMPANY EX. 13—FOURTH DOCUMENT

CHICAGO—August 27, 1952

MR. C. W. BRYAN, Jr.:

* * * *

Germano stated that the Union would prefer to negotiate, here in Chicago or some other central point, a master contract for the entire Company on all issues. However, he said he would be willing to negotiate with us here at the Company level on the basic principles of the Steel settlement, and upon reaching an agreement on the principles, call to Chicago a representative of each of the six local Unions and an International representative of each of the six local Unions for a discussion with him on the agreement of principles reached with us. It was his thought that the local Union representative and local International representative could then go to the plant which they represented and negotiate the rest of the labor agreement with the Works Manager. * * *

Germano stated that a "must," whether we bargain a local plant contract or bargain a Company-wide master contract, is a uniform termination date of labor agreements at the six plants represented by the Steelworkers —CIO.

* * * *

ROBERT C. SMITH

COMPANY EX. 13—FIFTH DOCUMENT

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY
INTER-DEPARTMENT CORRESPONDENCE

SUBJECT: DEPARTMENTAL SENIORITY

PLEASE REFER TO FILE

Bessemer, Alabama

July 10, 1953

MR. J.E. BOLEN:

After our meeting with Mr. Sleeman this morning and checking our seniority file would like to suggest to you that the Truck & Tractor Department, also Miscellaneous Stores Department be considered along with the Steel Stores set-up, as we have several employees in the Miscellaneous Stores Department working now under Mr. Studdard and carrying seniority in Miscellaneous Stores Dept. under Mr. Bradshaw's responsibility.

HERMAN THOMPSON

HST:bc
cc: Messrs. W. C. Sleeman
A. F. Smith

COMPANY EX. 14—FIRST DOCUMENT

NATIONAL LABOR RELATIONS BOARD

Tenth Region
Ten Forsyth Street Building
Atlanta, Georgia

August 2, 1941

Pullman-Standard Car Mfg. Co.
401 No. 24th Street
Bessemer, Alabama

Re: Case No. X-R-468

Gentlemen:

This office is in receipt of a petition for investigation and certification of representatives pursuant to Section 9(c) of the National Labor Relations Act, such petition having been filed by the Steel Workers Organizing Committee. In this petition it is alleged that the appropriate unit for purposes of collective bargaining is composed of all production and maintenance employees, exclusive of foremen, superintendents and clerical forces. It is stated further that the Union represents 1000 of the employees in the above classification.

* * * *

COMPANY EX. 14—SECOND DOCUMENT

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. R-2952

IN THE MATTER OF
PULLMAN-STANDARD CAR MANUFACTURING COMPANY

and

STEEL WORKERS ORGANIZING COMMITTEE

MOTION ON BEHALF OF PULLMAN-STANDARD CAR MANUFACTURING COMPANY

Now comes Pullman-Standard Car Manufacturing Company, a party in the above styled cause, and respectfully moves this honorable Board to consider and amend its Decision and Direction of Elections heretofore entered in said cause as of the 12th day of September, 1941, in the following particulars, namely:

(1) By striking out from the Board's Findings of Fact that sub-paragraph of paragraph numbered V reading as follows:

> "*Watchmen and plant-protection employees.* The Federal Labor Union desires the inclusion of these employees in the industrial unit. The S.W.O.C. has not expressed its position with regard to these employees. We shall include the watchmen and plant-protection employees in the industrial unit."

and by substituting therefor the words in substance:

> "Watchmen and plant-protection employees shall be excluded from both the craft and industrial units."

(2) By striking out from paragraph 3 of Direction of Elections the words appearing in lie 3 of said paragraph: "watchmen, plant-protection employees,".

In support of the above and foregoing motion Pullman-Standard Car Manufacturing Company respectfully submits that it is inappropriate that watchmen and plant-protection employees be included in any collective bargaining unit for the obvious reason that in the event of labor troubles of any kind or character such watchmen and plant-protection employees should have no selfish or personal interest in the result of any such labor troubles, but should be in a position to discharge their full duties free of any influence of selfish or personal interest in the union or any such labor difficulties.

The S.W.O.C. has advised the company through Noel R. Beddow, its Regional Director, that S.W.O.C. will consent and agree to the exclusion of said watchmen and plant-protection employees from voting in any of said elections. The company anticipates that appropriate representatives of Federal Labor Union will be willing to make a similar agreement if and when the company is able to contact such representatives and ascertain their views. The company is now endeavoring to contact such representatives and will advise this Board as soon as such contact has been made whether or not the said Federal Labor Union will make a like stipulation with regard to the exclusion of such watchmen and plant-protection employees.

Respectfully submitted,

PULLMAN-STANDARD CAR
MANUFACTURING COMPANY

By CABANISS & JOHNSTON
Its Attorneys

I hereby certify that a copy of the above and foregoing motion has been mailed to Noel R. Beddow, at Birmingham, Alabama, Regional Director of Steel Workers Organizing Committee, J. L. Giglio, at Birmingham, Alabama, representative of Federal Labor Union, J. R. May, at Montgomery, Alabama, attorney for IBEW, and Mr. J. H. Howard, Washington, D.C. and Mr. J. D. Baumgardner, at Birmingham, Alabama, attorneys for IAM.

JELKS H. CABANISS

COMPANY EX. 14—THIRD DOCUMENT

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. B-2952

IN THE MATTER OF
PULLMAN-STANDARD CAR MANUFACTURING COMPANY

AND

STEELWORKERS ORGANIZING COMMITTEE

MOTION ON BEHALF OF STEEL WORKERS ORGANIZING COMMITTEE FOR REHEARING IN MATTER OF INSTALLATION AND CONFIRMATION OF REPRESENTATIVES PURSUANT TO SECTION 9(c) OF THE NATIONAL LABOR RELATIONS ACT.

Comes your Petitioner in the above styled cause and respectfully move this Honorable Board to reconsider the Decision and Direction of Election heretofore rendered in the above styled cause on September 12, 1941, and grant Petitioner a rehearing in said cause and for grounds of said Motion assigns the following:

1. That the Decision and Direction of Election is not supported by the Record in said case.

2. The Record affirmatively shows that the Steel Workers Organizing Committee has carried on negotiations in collective bargaining with the Pullman Standard Car Manufacturing Company for a period of more than four years regardless of the fact that said negotiations have been conducted with little success. Petitioner feels that it should not be penalized because of the fact that these negotiations have been unsuccessful which would be the case if the fact of such negotiations were ignored by this Hon-

orable Board in the matter. The negotiations have been unsuccessful because of the failure of the company to negotiate with the union in good faith and thus to ignore the fact of these negotiations would be in effect to penalize the union for the unfair labor practices indulged in by the employer.

• • • •

4. The Record shows that the unit contended for by the International Association of Machinists is made up of employees who have never heretofore been classed as machinists either by the Intervening union or by the company. Said employees work in many diversified and unrelated types of work and are spread in small groups all over the company's plant and have very little in common either from the standpoint of similarity of tasks, rates of pay or degree of skill.

Your Petitioner feels that if the Decision heretofore rendered in this case is allowed to stand that an election held pursuant to such Decision and Direction of Election will in no way be instrumental in bringing about harmony in the operation of the Company's plant but rather will totally and entirely defeat the purposes and policies of the National Labor Relations Act, as stated in Section 1 thereof.

PREMISES CONSIDERED, Your Petitioner, Steel Workers Organizing Committee, moves this Honorable Board to again review the Record in this case and enter an order withdrawing the Decision and Direction of Election heretofore rendered on September 12, 1941 and enter an order directing that an election be held on the basis of the finding by the Board that the appropriate unit for such election shall be an industrial unit in which all the production and maintenance employees exclusive of foreman, superintendents and clerical forces, be permitted to vote and thus determine whether they desire

to be represented by the Steel Workers Organizing Committee, either of the three intervening unions or by no union.

Petitioner prays for such other, further or more general relief to which it may be entitled in the premises.

Respectfully submitted.

STEELWORKERS ORGANIZING COMMITTEE
Affiliated with Congress of
Industrial Organizations
Steiner Bldg., Birmingham, Ala.
By: /s/ J. R. Crawford, Representative
Noel R. Beddow, Regional Director

COMPANY EX. 14—FOURTH DOCUMENT

CABANISS & JOHNSTON
First National Building
Birmingham

January 19, 1942

Mr. W. C. Sleeman,
Pullman-Standard Car Manufacturing Co.,
Bessemer, Alabama.

Dear Mr. Sleeman:

As I telephoned the office, representatives of the NLRB and also the Regional Director in Atlanta, are calling and writing to ask that the Company let them have return with its OK so far as the Company is concerned, of the agreement as to reclassification agreed on between AFL and CIO.

I see no adverse bearing in letting them have return of the memorandum with the Company's OK, particularly if as I suggested, it be made subject to NLRB. Since the Atlanta office seems to attach some importance to it I suggest you let it go forward.

It seems certain now that AFL and CIO have buried the hatchet and will within a few days form a solid front to maintain their extraordinary position both now and after the war; in short, that we will have labor control of government and industry in line with the British post-war certainty. So far as this plant is concerned it doesn't seem to me to make much difference as to the classification.

Very truly yours,

/s/ Forney Johnston

FJ:LC

COMPANY EX. 14—FIFTH DOCUMENT

UNITED STEELWORKERS OF AMERICA
—< CIO >—
Third Floor Steiner Building
Birmingham 3, Alabama
[UNION BUG]

May 18, 1944

NOEL R. BEDDOW,
SOUTHERN DIRECTOR

R. E. FARR,
DIRECTOR DISTRICT 36

Mr. W. C. Sleeman
Manager of Works
Pullman Car Mfg. Co.
Bessemer, Alabama

Dear Sir:

We have been requested by what we think might be a substantial majority of your employees, who are now in the I.A.M. Unit, to bargain for them in regards to rate of pay, hours of work and conditions of employment.

We are not soliciting or coercing any employees in this department to become members of our Union and the request that has been made by them has been voluntarily on their part.

They also request that we ask you for a negotiation of a contract which would include these employees in the same contract that we have with you in the United Steelworkers' Bargaining Unit.

Thanking you for your past cooperation, I am

Very truly yours,

/s/ R. E. Farr
R. E. FARR, Director
District #36

REF/df

COMPANY EX. 14—SIXTH DOCUMENT

NATIONAL LABOR RELATIONS BOARD

Tenth Region
10 Forsyth Street
Atlanta 3, Georgia

May 25, 1944

Pullman-Standard Car Manufacturing Company
401 North 24th Street
Bessemer, Alabama

Re: Case No. 10-R-1212

Gentlemen:

This is to inform you that United Steelworkers of America, May 25, 1944, filed with this office a petition for investigation and certification of representatives, pursuant to the provisions of the National Labor Relations Act, alleging that a question affecting commerce has arisen concerning the representation of employees in the following unit:

"All machinists, apprentices and helpers, employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handymen, and cranemen, millwrights, production and maintenance welders, employees in wheel, axle and truck shop, except for foremen, leaders and clerical employees."

* * * *

COMPANY EX. 14—SEVENTH DOCUMENT

Bessemer, Alabama
May 26, 1944

MR. N. B. JOHNSON:

We are attaching photostat copy of NLRB's letter of May 25, 1944, which has been cased under the number 10-R-1212, in which it is noted the CIO is petitioning for an investigation and certification of representatives from the departments now represented by the IAM. It so happens (as is usually the case) the request by the CIO is to our notion all "balled up" in that they are asking for representation which they already have; that is, the Truck Shop. They apparently want representation for all departments for whom the IAM now represents, but do not request same in that they have omitted the following occupations which were specifically set out as a part of the IAM bargaining unit in the letter signed by both the IAM and the Steelworkers Organizing Committee, which clarified the NLRB's order for this bargaining unit. The occupations which have been omitted in this letter are tackers, burners and welder helpers in the Welding Department, the Air Brake Department including pipe fitters, pipe fitter helpers, air testers and the tool room employees in the Steel Erection Department.

It is hardly conceivable they would want IAM to represent these particular departments in that there are only approximately 45 employees in these departments which have been omitted.

* * * *

W. C. SLEEMAN

* * * *

COMPANY EX. 14—EIGHTH DOCUMENT

UNITED STEELWORKERS OF AMERICA

— <CIO> —

Third Floor Steiner Building
Birmingham 3, Alamaba

[UNION BUG]

OFFICE OF
R. E. FARR
DIRECTOR DISTRICT 36

TELEPHONE 4-8534

December 12, 1945

Mr. W.C. Sleeman, Manager
Pullman Standard Car Mfg. Co.
Bessemer Plant
401 - North 24th Street
Bessemer, Ala.

Dear Sir:

This is to inform you that the majority of the electricians, electrician helpers and employees of the electrical department, now in a unit set up by the National Labor Relations Board known as the I.B.E.W. unit of your plant, has requested the United tSeelworkers to represent them.

We would like to meet with you at an early date. Looking forward to getting these men under a workable agreement with the United Steelworkers of America, I am

Yours truly,

/s/ R. M. Poarch
R. M. POARCH
Field Representative

RMP/fh

REGISTERED MAIL

[SEAL]

COMPANY EX. 14—NINTH DOCUMENT

[SEAL] [EMBLEM]

NATIONAL LABOR RELATIONS BOARD
Tenth Region
300 Ten Forsyth Street Building
Atlanta 3, Georgia

January 18, 1946

Pullman Standard Car Manufacturing Company
401 North 24th Street
Bessemer, Alabama
Re: Case No. 10-R-1711

Gentlemen:

United Steelworkers of America (CIO) has filed with this office a Petition for Certification of Representatives, pursuant to Section 9(c) of the National Labor Relations Act, claiming to represent a majority of the employees in the following allegedly appropriate unit:

> The Unit now covered by the United Steelworkers of American to be expanded to include all production and maintenance employees that were formerly in the I.B.E.W. Unit except for foremen and supervisors.

This matter has been referred ot Field Examiner Frederick A. Alcher for handling. On or before January 25, 1946, will you please forward to him in this office the following information:

1. One completed copy of the enclosed Interstate Commerce Questionnaire. You may retain the other copy of your files.

2. Name of any labor organization that has a contract with you (and two copies of the contract) or has

made a request for recognition as collective bargaining representative of any of the employees in petitioner's alleged appropriate unit.

3. Your position as to the appropriateness of the unit set forth in the petition as described in the first paragraph of this letter. If you disagree as to the appropriateness of the unit, please state in detail the unit you believe to be appropriate and your reasons for any changes you suggest.

4. An alphabetical list of all employees showing job classifications as of the present date and a statement of the percentage turnover per month. This list is necessary to determine whether or not the union has a sufficient interest to warrant proceeding with the case and holding an election. Failure to furnish the list will, of course, result in the acceptance of the union's evidence as to its interest without further check.

5. Any reason why an election should not be held in the unit as set forth in the first paragraph of this letter at this time or in the near furnish.

We wish to cooperate in every possible way with you and the labor organization involved so that there may be an early and appropriate disposition of this matter. Please do not hesitate to discuss with the Field Examiner any question you may have.

Very truly yours,

/s/ Paul L. Styles
PAUL L. STYLES
Regional Director

Enclosures:

Interstate Commerce Questionnaire—2

COMPANY EX. 14—TENTH DOCUMENT

(Suggested form of letter to NLRB in reply to request dated January 18, 1946)

Mr. Fred Aicher, Field Examiner,
National Labor Relations Board,
300 Ten Forsyth Street Building,
Atlanta 3, Georgia.

Dear Sir:

In reply to the letter of Regional Director Paul L. Styles, we advise as follows:

1. Copy of Interstate Commerce Questionnaire is returned, except that questions IX to XVI are included in our reply to XVI, which concedes that the Company's purchase of interstate materials and the nature of business is sufficient to subject the Company's operation at Bessemer to the National Labor Relations Act. This has been determined in previous proceedings and is not questioned.

2. Hereto attached are two copies of contract between this Company and International Brotherhood of Electrical Workers heretofore certified as bargaining agency for the electrical workers at this Company's Bessemer plant, together with an amendment dated October 9, 1944. This contract was in effect on October 31, 1945 when all of the electrical workers at that plant struck. This strike resulted in a stoppage of production work at the plant for more than a month and until the Company was able to replace all of the striking workers. All of the striking employees have applied for or have accepted termination slips. Several have requested re-employment, but have not been re-employed on account of the fact that their places were and are filled by new workers employed during the course of the strike. At the time of the strike the Company employed thirteen

electrical workers. As of the period January 14 - January 20th, the Company had in its employ twenty-eight workers in that unit. The excess number were employed on account of maintenance neglected during the strike.

3. The Company understands that a separate unit for electrical workers in the plant is not requested by the petitioning unit, but that the petition of the Union is that the electrical workers be included among the production and maintenance employees now represented by United Steelworkers of America (CIO). In short, the Company understands that the petition is that the proposed bargaining unit represented by United Steelworkers of America is to include all production and maintenance employees at the Bessemer plant other than executive, supervisory, clerical, foremen and leaders with the exception of the following:

> All machinists, machinist apprentices, machinist helpers; employees in tool and die shop classified as die men, machine operators, toolroom men, toolroom helpers, handy-men and crane men, other than laborers and hook-ons; also all millwrights.

Presently included within this general unit, as a result of agreement between International Association of Machinists and United Steelworkers of America Local No. 1466, are the following workers, who are already represented by said United Steelworkers of America (CIO), with the general exception of supervisory and clerical employees first above stated, viz:

> "* * all employees classified as production and maintenance burners, welders, tackers, burner and welder helpers; employees in the wheel and axle department; airbrake production employees classified as pipe fitters, pipe fitter helpers and airbrake testers; employees in erection department classified as toolroom men and tool-room helpers, * *".

This Company takes no position for or against the practical inclusion of electrical workers in the above or any bargaining unit with which the electrical workers employed at this plant desire to affiliate, but does not consider a general vote of all plant employees desirable, for the reason stated below.

4. Attached hereto is a list showing all electrical workers in the Bessemer plant on the payroll January 14-January 20, 1946. Between October 31st and December —, when electrical work was resumed at the plant, the turnover was 100% as a result of replacement of workers who had struck or quit. Since resumption of operations on December —, 1945, a total of —— electrical workers had been employed and —— of that number have been released or quit.

5. The Company does not see any reason why there should be a general election of all workers in the Company's Bessemer plant to vote on the proposed enlarged unit set forth in the petition. Such action would unnecessarily involve participation by the large number of workers at the plant already represented by United Steelworkers of America in a detail in which they are not, from a practical standpoint, interested. It would involve unnecessary expense and confusion in operations to call on these general workers to vote with respect to the extension of the unit to include electrical workers. The Company suggests that any question of representation of the electrical workers be determined by check or vote of such workers.

Very truly yours,

PULLMAN STANDARD CAR
MANUFACTURING COMPANY
(Bessemer Plant)

By

PULLMAN-STANDARD CAR MANUFACTURING COMPANY
BESSEMER, ALABAMA PLANT

Electrical Department Employees

Payroll 1-4 to 1-20 inclusive

Name	Occupation
William Anthony	Electrician
Curtis G. Bailey	Electrician
Gerald Beggs	Power House Operator
James A. Carver	Electrician Helper
Oscar L. Carver	Electrician
George A. Christian	Electrician
Frank Clements	Electrician
William W. Dawkins	Electrician
Charles H. Dove	Electrician Helper
John Dove	Electrician
Louis Edwards	Electrician
John P. Fleming	Electrician
Willie E. Hall	Electrician
Joe Harper	Electrician
Joseph S. Hollingsworth, Sr.	Electrician
John L. Kelley	Electrician
Jesse A. Lanier	Electrician
John D. McCrory, Jr.	Power House Operator
Orris C. Miller	Electrician
Wallace F. Milner	Electrician
Arthur L. Phillips	Electrician
Lloyd B. Rainey	Electrician
John A. Roberts	Electrician Helper
William M. Roberts	Electrician
Menendezth L. Snow	Electrician
Harvey D. Trawick	Electrician
Hugh B. Valiely	Electrician
William R. Warnick	Electrician

COMPANY EX. 15

MISCELLANEOUS

Bessemer, Alabama
January 30, 1948

MEMORANDUM TO FILE:

This morning at approximately 10:30 Mr. R. C. Logan, Superintendent, and Mr. K. C. Chapman, Assistant to Mr. Logan, of the Eastern Car Company, Limited, of Trenton, Nova Scotia, came to the Plant and were taken through the Plant by Bolen.

During their visit to the Plant, Bolen was told that at the present time they were building 15 standard box cars per day with a working force of approximately 1100 men and an additional 100 men were employed making doors (Camel) and other necessary material.

They advised their building was 90′ wide and approximately 1200′ long, with an erection track of 8 positions for hopper cars or 9 positions for box cars. Did not know their rivet driving averages nor did not discuss in detail production methods or amounts of production obtained, however, they did leave with us a copy of their car contract which included all their hourly guarantee rates and we were advised that these rates had been increased by 5½¢ per hour recently. They also advised their piece work men were expected to earn from 30 to 50% above their hourly guarantee rates.

• • • •

THE EASTERN CAR COMPANY, LTD.
RATE SCHEDULE—1947

SHEARING DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92

Coper 1, 2, 3, 4, 5 and 6—Operator	.72½
—Helper	.70½
Shear 1, 2, 4 and 5—Operator	.72½
—Helper	.70½

PRESSING DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Large Press—Operator	.73
—1st Helper	.71½
—2nd Helper	.71½
—3rd Helper	.70½
—4th Helper	.70½
Lever Boy	.56½
Small Press—Operator	.73
—1st Helper	.71½
—2nd Helper	.70½
Lever Boy	.56½

PUNCHING DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Punch 1, 5, 7, 11, 14, 15, 16, 17, 18, 19—Operator	.72½
—Helper	.70½
Punch 3, 4 and 10—Operator	.73
—Helper	.71½
Punch 12—Operator	.76
—1st Helper	.71½
—2nd Helper	.70½
Machine Cleaner	.68½
Markers	.72½
Die Setters—1st Class	.84
—2nd Class	.79½

CONSTRUCTION & ERECTION DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Inspector	.86½
Steel Chaser	.84
Riveters	.76-.84
Buckers	.75-.77
Reamers	.74
Fitters	.74
Heaters—1st Class	.69½
—2nd Class	.61

—3rd Class	.58½
Sticker—1st Class	.69½
—2nd Class	.61
—3rd Class	.56½
Chippers	.76

TRUCK DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Dopers—1st Class	.79½
—2nd Class	.74
Fitters	.74
Helpers	.70½

WHEEL & AXLE DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Axle Turners	.72-.86
Wheel Rollers	.70½
Tool Grinders	.84
Boring Mill Operator	.73-.85

WOOD ERECTION DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Carpenters—1st Class	.88
—2nd Class, Bldg. Track	.73
—Helpers	.71½

PAINT DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Painters	.76-.84
Paint Mixers—1st Class	.84
—2nd Class	.78
Sprayers	.70-.82

MACHINE SHOP:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Machinists—1st Class	.93½
—2nd Class	.90
—3rd Class	.86
—4th Class	.76

Drill Handle and Operators	.73
Repairmen—1st Class	.82
—2nd Class	.80
—3rd Class	.76
Blacksmith	.93½
Blacksmith's Helper	.71½
Tool Room Attendant	.79½

FORGE DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Ajax No. 1—Operator	.76
—Helper	.71½
Ajax No. 2—Operator	.73
—Helper	.71½
Ajax No. 3—Operator	.76
—Helper	.71½
Drill No. 1 and 2—Operator	.73
Drill No. 3—Operator	.73
—Helper	.70½
Drill No. 4—Operator	.73
Drill No. 5—Operator	.73
Bulldozer No. 1 and 2—Operator	.76
—Helper	.71½
Bulldozer No. 3—Operator	.73
Bulldozer No. 4—Operator	.73
Shear No. 1 and 2—Operator	.72½
Shear No. 3—Operator	.72½
Eye Bender—Operator	.73
Markers	.72½
Hammer No. 1—Blacksmith	.84
—Helper	.71½
Hammer No. 2—Operator	.73
—Blacksmith	.90
—1st Helper	.71½
—2nd Helper	.71½
Hammer No. 4—Operator	.76
—Helper	.71½
Hammer No. 5—Operator	.76
—Helper	.71½
Hammer No. 6—Operator	.76
—Helper	.71½
Hammer No. 7—Operator	.76
—Helper	.71½
Hammer No. 8—Operator	.73
—Helper	.71½
Punch No. 6—Operator	.72½

Punch No. 8—Operator	.72½
Punch No. 39—Operator	.72½
Blacksmith—1st Class	.93½
—2nd Class	.90
—3rd Class	.84
—Helper	.71½
—Fireman	.71½
—Stockchaser	.76
Grinders—Operator	.73
Butt Welder—Operator	.76
—Helper	.71½

CARPENTERS & CONSTRUCTION MEN:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Janitor	.69½
Carpenters—1st Class	.83
—2nd Class	.79½

PATTERN DEPARTMENT:

Pattern Makers—1st Class	.93½
—2nd Class	.90
—3rd Class	.86

MILLWRIGHT DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Millwrights—1st Class	.86½
—2nd Class	.81
—3rd Class	.79
—4th Class	.76
Sprinkler Attendant	.76

FURNACE MEN:

Furnace Repairman—1st Class	.82
—2nd Class	.77½
—Helpers	.73

ELECTRICAL DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Winders—1st Class	.93½
—2nd Class	.90
—3rd Class	.86
Repairman—1st Class	.93½
—2nd Class	.90

—3rd Class	.86
—4th Class	.81
—5th Class	.76
Crane Operator—1st Class	.79½
—2nd Class	.76

ELECTRIC & ACETYLENE WELDING DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Welders—1st Class	.90
—2nd Class	.84
—3rd Class	.76
—Helpers	.70½

SHOP LABOR:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Head Fireman—1st Class	.76
Hookon—1st Class	.76
—2nd Class	.73
Firemen	.71½
Transfer Man	.76
Laborers	.69½
Leader on Bolt Table	.76

PNEUMATIC TOOL ROOM:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Tool Repairs—1st Class	.84
—2nd Class	.83
—3rd Class	.79½
—4th Class	.76
—Attendant	.69½

PLANING MILL:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Planer W-1—Operator	.74
—Helper	.70½
Gainer and Borer—Operator	.74
—Helper	.70½
Swing Cut-off Saw W-10—Operator	.74
—Helper	.70½
Motiser-Vertical—Operator	.74

Shaper W-20—Operator	.74
Auto-Cut-Off Saw W-24—Operator	.74
Matcher W-32—Operator	.74
—1st Helper	.70½
—2nd Helper	.70½
Sizer W-1—Operator	.74
—1st Helper	.70½
—2nd Helper	.70½
Tool Dresser—1st Class	.93½
—2nd Class	.90
—Helpers	.70½

AIR & EQUIPMENT DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Pipe Fitters	.76

GALVANIZING DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
—Kettle Operator—1st Class	.85
—2nd Class	.82
Acid Men—1st Class	.80½
—2nd Class	.78½
Helpers—1st Class	.77½
—2nd Class	.75

SAND BLAST DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
—Operators	.79½
—Helpers	.76
—Repairmen	.90
—Oilers	.79½

TINSMITH DEPARTMENT:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Tinsmith—1st Class	.83½
—2nd Class	.81
Helpers—1st Class	.76
—2nd Class	.72
—3rd Class	.71½

WOODEN CAR STORE ROOM:

Working Foreman	.79½

Attendant	.68½
General Stores—Foreman Casting Yard	.79½
—Checkers 1st Class	.73½
2nd Class	.71
—Attendant	.69½
—Truck Driver	.69½-.76

STEEL YARD:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
—Hookon 1st Class	.76
2nd Class	.73

LUMBER YARD:

Working Foreman—1st Class	$1.04½
—2nd Class	.98
—3rd Class	.92
Lumber Sorter	.76
Dry Kiln Attendant	.76
Checker—1st Class	.73½
—2nd Class	.71
Inspector (Road)	per day 8.03

POWER HOUSE:

Boiler Operator	.80
Mill Operator	.76
Firemen	.76
Boiler Cleaner	.76
Ashmen	.70½
Engineer Operator	.86½
Pump Operator	.76
Engineer Operator (Old Unit)	.78½
Oiler	.69½
Repairmen	.86½
Clerk	.73-.76

LOCOMOTIVE & YARD CRANE:

Clerk	.89½
Locomotive Engineer	.86
Crane Operator—1st Class	.86½
—2nd Class	.78½
Brakemen	.76
Firemen	.76
Night Watchmen and Firemen	.76
Leading Brakeman (Night)	.82

TRACK CONSTRUCTION & REPAIRMEN:

Trackmen	.71½
Labor	.69½

COMPANY EX. 16

NATIONAL WAR LABOR BOARD

#111-2416-D

IN THE MATTER OF
THE PULLMAN STANDARD CAR
MANUFACTURING COMPANY

AND

UNITED STEELWORKERS OF AMERICA, CIO
FOR AND ON BEHALF OF LOCAL 1466

REPLY OF PULLMAN STANDARD CAR MANUFACTURING COMPANY TO BRIEF FILED BY UNITED STEELWORKERS OF AMERICA CIO

There are a number of statements in the Union brief that are inadvertent and might properly be corrected, but may be passed by as immaterial or can be corrected at the hearing.

The following comment is limited to certain statements or arguments in the brief which seem clearly in error:

* * * *

8. The CIO brief (page 6, etc.) undertakes to give the impression that this plant is discriminating against the negro, or operating under some sort of North-South differential. It is obvious that no such vague and unlimited inquiry or charge is involved in this matter. Not a single fact is suggested in the CIO brief to justify the contention that it is involved. The suggestion is so lacking in any foundation in fact that the Company is not willing to treat it as an issue. There is probably not a colored worker at this plant who would not express his belief in the considerate treatment of the negroes at the Pullman plant. This shop is primarily a

piece shop work. Earnings reflect the amount of effort put forth. There are many instances in which good colored workers show higher earnings than the white workers. On the other hand, the records show instances in which the white workers on machines usually operated by colored workers, doing the same work at the same rate, have substantially exceeded the earnings of the colored worker. There is nothing to justify the implied suggestion that as to white or colored employees they should be forced to an arbitrary dead level of earnings without respect to the effort put forth.

* * * *

12. As to Union security and check-off. The Company denies point blank the statement that the Company's tactics in negotiations have created dissatisfaction among the union members and that its anti-labor history justifies the necessity for union security now. It is to be doubted if there is a plant in the South in which there is less justification for either statement. There is not a pending or unsettled grievance between the Company and any Union represented in this plant. There has never been a grievance that was not promptly considered and disposed of.

The sole questions open for discussion are those relating to the proposed new contracts. The statement of the brief that there are three Unions in the plant and that Union security is essential to prevent conflict is not even remotely justified by the facts. We have pointed out that the bargaining units were established by overwhelming majorities at elections held for the purpose. There has never been any complaint of encroachment or any jurisdictional controversy or any effort of any one of the Unions or any outside union to supersede any existing union.

The existence of three unions in the plant is not only not an argument for compulsory union maintenance. It

is, in this particular plant, an argument against freezing personnel for the duration of their employment in any particular union, since union maintenance would tend to complicate the transfer of workers from one job to another, for which they are fitted, when such change is required by the work offered to the plant or during periods between full line production. This transfer has been of definite benefit to the men in the past and the Company does not want to be tied down by an arbitrary agreement that would prohibit that necessary elasticity. These men in the different unions work in many instances side by side and without friction. If the Company has to reverse their tasks or the handling of their jobs, in a manner wholly satisfactory to the men, it does not want to be limited by an arbitrary provision in a labor contract against that reasonable or necessary action, freezing them on a particular union.

The intimation of the brief (page 9) that the negro workers are subject to coercion and intimidation by the Company, and the unwarranted reference in the CIO brief to the Company's employment manager call for no answer except the statement that they are too unfounded and too irresponsible to merit any attention except the statement that they are untrue and irresponsible. This Company has never at any time coerced or intimidated any negro or other employee into or out of any Union or subjected any negro to unkind or inconsiderate treatment. The proportion of negro employees is not 70%. As pointed out above, the work in this plant is so intermingled or interchangeable that the Company could not "discriminate" substantially against Negro employees without "discriminating" against its white employees. No one ever heard of alleged "negro-white" discrimination at this plant until CIO's representative indulged in that suggestion first in Washington before the War Labor Board in 1941 (resulting in a hearing and complete vindication of the Company) and again at the time of the negotiation of the contract in 1942, when the

alleged mistreatment of negroes was one of the arguments for a wage increase before the War Labor Board panel. No evidence of any such discrimination was tendered and both the union and the War Labor Board panel approved the present contract and wage scale. The repetition of the argument as a basis for further wage increase and also for union maintenance is therefore nothing more than "the same old monk and the same old saddle-bags"; nothing new, nothing pertinent, nothing accurate.

The fact of the matter is that the only coercion of negro workers proposed at the plant is the Union's proposal to freeze them into the Union and require that they be fired on demand by the Union if they fail to pay their dues. If the negroes are not members or not paying dues, the effect of the provision would be to coerce them. The Company does not know whether they are paying dues or not. If they are not, the compulsion would tend to drive them out of the employment. If they are, there is no necessity for the compulsion.

There is no necessity for it in any event. Whatever the present status is, without compulsion, it is having no adverse effect on employment at the plant or upon essential production. There are obvious respects in which if required it might in this particular plant have an adverse effect.

The requirement of compulsory union maintenance would throw an arbitrary factor into the problem of employment, which is greatly complicated by the labor freeze order of the government.

• • • •

COMPANY EX. 18

[SENIORITY LIST OF PULLMAN'S BUTLER, PA. PLANT AS OF EARLY 1956]

SHEAR DEPARTMENT

• • • •

PRESS DEPARTMENT

• • • •

PUNCH DEPARTMENT

• • • •

FABRICATION DEPARTMENT

• • • •

CONSTRUCTION DEPARTMENT

• • • •

TRANSPORTATION & MATERIAL STORAGE

• • • •

ERECTION DEPARTMENT

• • • •

TRUCK AND AXLE DEPT.

• • • •

WOOD CAR PLANING MILL

• • • •

WOOD CAR ERECTION

• • • •

LABOR DEPARTMENT

The following workers in the department will be found on the Unskilled List. Figures are to be used on *Unskilled only.*

Mill Janitors

• • • •

Main Office Janitors

• • • •

Shop Laborers

• • • •

PAINT & EQUIPMENT DEPARTMENT

• • • •

SHIPPING DEPARTMENT

• • • •

STEEL CAR STORES DEPARTMENT

• • • •

WELDING INSPECTORS

• • • •

GENERAL STORE ROOM

• • • •

BOLT & RIVET STORES

• • • •

COMMERCIAL FORCE DEPARTMENT

• • • •

STORES & TRANSPORTATION
RAILROAD DEPARTMENT

• • • •

DIE AND TOOL DEPARTMENT

• • • •

MACHINE REPAIR

• • • •

BLACKSMITH DEPARTMENT

• • • •

TOOL ROOM

• • • •

WELDING DEPARTMENT

• • • •

PATTERN DEPARTMENT

• • • •

CARPENTER DEPARTMENT

• • • •

POWER DEPARTMENT

• • • •

MAINTENANCE DEPARTMENT

• • • •

ELECTRICAL & CRANES

• • • •

ELECTRICAL DEPARTMENT

• • • •

FOUNDRY

• • • •

COMPANY EX. 23

SELECTED LABOR ARBITRATION CASES AND TEXTS

Relating to the Rational Basis for Departmental Seniority Systems as Opposed to Plantwide Seniority

SELECTED LABOR ARBITRATION CASES AND TEXTS

TABLE OF CONTENTS

1. Benrus Watch Co., 2 LA 61 (1946) (Maxwell Copelof) .....

2. General Television & Radio Corp., 2 LA 483 (1942) (Whitley-P. McCoy) .....

3. Republic Steel Corp., 2 LA 563 (1944) (Whitley P. McCoy) .....

4. Santa Clara County & Central California Meat Processor's Ass'n, 36 LA 42 (1961) (Hubert Wyckoff) .....

5. Rayonier, Inc., 62-2 ARB ¶ 8458 (A. R. Marshall) ..

6. Petro-Tex Chemical Co., 77-1 ARB ¶ 8150 (Claude B. Lilly) .....

7. Clarence M. Updegraff, Arbitration and Labor Relations (3d Ed.,) pp. 303-305 .....

SUMMARY

THE RATONAL BASIS FOR DEPARTMENTAL SENIORITY SYSTEMS AS OPPOSED TO PLANTWIDE APPLICATION OF SENIORITY: AS VIEWED BY LABOR ARBITRATORS AND STATISTICIANS (A SUMMARY OF RELEVANT PRINCIPLES EXPRESSED IN SELECTED ARBITRATION CASES AND TEXTS IN THIS VOLUME AND BUREAU OF LABOR STATISTICS BULLETINS 1425 SERIES)

Labor arbitrators have, over the past 30 years, evolved a body of principles in interpreting and applying seniority provisions in union contracts, filling gaps and omissions in them, and deciding in interest arbitration cases what the seniority rules should be in union contracts. A representative selection of arbitration cases and texts expressing those principles are included in this volume; references to them as numbered in the Table of Contents herein are indicated by superscript numbers in this summary.

Likewise Bulletins of the USDL Bureau of Labor Statistics analyzing major collective bargaining agreements (1425 series) express certain inductive conclusions about the reasons why different types of seniority systems are characteristically found associated with various sizes and compositions of work forces.

Such principles are properly to be considered in determining, under the controlling Supreme Court's decisions, whether the seniority system adopted by Pullman-Standard and the United Steelworkers is bona fide. Those decisions establish that what is customary and usual in the industry is an important element in determining bona fides. Hence, in addition to studying empirically the seniority systems of railroad equipment manufac-

turers, an inquiry into the rational basis of different seniority systems as articulated by those whose business it is to ascertain it, is relevant to ascertaining the bonafides of the Pullman seniority system.

The seniority clause of a collective bargaining agreement is the "Union's clause";[6] that is, it confers no advantage whatsoever upon management. Without it, management can layoff, recall, promote, hire or discharge governed only by pure self-interest and legal limitations. Thus a seniority clause is demanded by the Union, not by management; management's self-interest obviously requires that it minimize the impact of a seniority system on efficiency and profitability of the business.

> "For purposes of efficiency and to minimize disruptions, most employers prefer to confine promotions, at least initially, within small units and jobs calling for identical or closely related skills; most unions prefer broader units permitting a wider range of promotions." BLS Bulletin 1425-11, Major Collective Bargaining Agreements: Seniority in Promotion and Transfer Provisions (1970) 11.
>
> "The Company's chief interest in the seniority issue is to insure against more years of service being considered of more importance than skill, ability, initiative, physical fitness, etc.; its chief interest is the question of what units are separate for seniority purposes is to insure proved ability to perform the very job in question. If those interests of the company are properly protected, it would appear that the [seniority unit] should be a matter primarily of what the employees themselves desire.[3]
>
> "The interest of the Union in thus protecting . . . the members of the bargaining unit . . . come into conflict with the management's desire to have the most skilled and knowledgeable employees. . . ."[4]

Where the work performed in different departments or jobs is distinct and the skills not interchangeable, management regards plant wide seniority to be unworkable and destructive of efficiency.[1] Where prolonged training on new jobs is required efficiency must suffer.[1]

The union characteristically does not like it when a senior employee is laid off in one department while juniors continue working in others.[1] On the other hand, it is true that opposite inclinations may be felt both by management and employees.

> "(1) Employers may want to extend eligibility to other groups if qualified employees are not available in the specified unit, and (2) many workers, particularly those with lesser seniority, support a promotion policy restricting applicants from outside units." BLS Bulletin 1425-11, p. 11.

In layoffs, department employees may resent displacement of one of their number of an outsider. Particularly where a seniority system has been long in effect, resistance to change may be strong among employees, who fear loss of their vested status or niche in the organization. Narrow seniority units may also help support union claims to exclusive work assignment rights.[6]

Consequently, the balance typically and usually struck between these competing interests, is to adopt seniority units narrower than plant wide, such as job classification, occupational group of classifications, line of progression, craft, or departmental units, where employees or skills are not readily interchangeable without loss of efficiency.[1,2,6] Where the work force is essentially homogeneous, a broader seniority grouping as plant wide, company wide or multi-company is more usual.

Geographical separation or even scattering of employees are not particularly significant in deciding whether employees should be grouped together in a seniority unit;

interchangeability of skills and impact on efficiency if so grouped, are the relevant considerations in deciding a dispute over whether a number of employees constitute one or two departments, where the contract is not explicit.[3,4] Likewise, in interpreting ambiguous contractual provisions involving questions of inter-departmental transfers.[5]

These principles are applied by arbitrators in resolving the uncertainty in a union contract when it fails—

> ". . . . to indicate clearly whether the seniority shall be plant-wide or on a departmental or job basis. Here the character of the business may furnish a determining index. If there are several jobs involving greatly varying skills in a situation where there is great likelihood that people of one skill may be needed at times when others are not, the conclusion that the seniority was intended to be on a departmental or skill classification basis may be justified. On the contrary, if there is virtually no work usually classified as skilled within the plant, the conclusion may well be that seniority should be recognized on a plant-wide basis. [If the agreement is not clear] the nature of the business and past practice may be the guiding lights." [7]

Over half of the major collective bargaining agreements, and over half the employees, covered in the BLS study of "Seniority in Promotion and Transfer Provisions," Bulletin No. 1425-11 (1970) had departmental or more restrictive seniority units (Ibidem, p. 12).

COMPANY EX. 24

PERTINENT EXCERPTS RELATING TO DEPARTMENTAL SENIORITY SYSTEMS—FROM SELECTED ARTICLES IN MONTHLY LABOR REVIEW, UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, 1938-1955 * * *

SUMMARY OF PERTINENT EXCERPTS RELATING TO DEPARTMENTAL SENIORITY SYSTEMS, SELECTED *ARTICLES IN MONTHLY LABOR REVIEW, USDL, 1938-1955*

The study entitled "Seniority Provisions in Collective Agreements", Monthly Labor Review, December, 1938, 120, 1252-53, observed that plant wide seniority systems were "most prevalent in shops in which all employees follow the same craft or in plants where the jobs are more or less interchangeable." It further pointed out that—

> "In larger establishments where operations are more varied, it is common to establish separate lists on departmental lines or according to job specifications. Thus, only workers doing the same type of work, or engaged in the same industrial processes, are considered to be in competition when jobs are filled or promotions made. This form of seniority limits the workers to be considered to those most likely to be fitted for the jobs involved."

Thus the variables associated with departmental seniority systems were large size and non-interchangeable skills. Small plants and ones with work forces having similar skills were more likely to have plant-wide seniority systems.

The Study of "Workers' Attitudes on Work Sharing and Lay-Off Policies in a Manufacturing Firm," Monthly Labor Review, January, 1939, 47, 49, pointed out that

departmental seniority systems were favored sometimes by employee attitudes of resentment of an outsider's displacing or bumping an employee in a given department.

The study of "Collective Bargaining by United Rubber Workers," Monthly Labor Review, September, 1939, 604, 612-13, based on 54 Rubber Workers contracts in 11 states, found that:

> "In a majority of the agreements, including those covering all of the larger companies, departmental seniority is the determining factor in selecting employees for transfer, promotion, lay-offs, and rehire."

The study of "Union Agreements in Aircraft Manufacture," Monthly Labor Review, August, 1940, 290, 295-96, based on 12 contracts filed with the Bureau of Labor Statistics found:

> "Eleven of the twelve agreements contain seniority provisions. Six of them provide for seniority on a departmental basis, while three establish plant-wide seniority and one, seniority within job classifications."

The study of "Union Agreements in Shipbuilding," Monthly Labor Review, September, 1940, 597, 605-06, based on 28 contracts filed with the BLS, found:

> "All of the agreements, except seven signed by craft unions [which presumably operated hiring halls or referral systems typical of such unions], give some recognition to seniority. In all cases seniority is on an occupational or departmental basis."

The article entitled "Contract Clauses on Seniority as a Factor in Layoffs," 78 Monthly Labor Review 766, 767-69 (July, 1955) says in pertinent part:

> "The seniority unit within which employees are ranked in order of retention is generally determined by the requirements of plant operation. A broad sen-

> iority basis, e.g., plantwide, may be deemed appropriate where occupations within the plant are fairly uniform or are readily learned. Where a wide range of operations and skills is required to manufacture a product, the workers who compose a single production line, a department, or a job classification may be grouped in a seniority unit."

In short, official government studies show that throughout the period of formation of the Pullman-Steelworkers seniority system, similar systems were prevalent in industries of comparable size and variety of skills, throughout the country, including the rubber industry, aircraft manufacture, and shipbuilding. They also show that the larger the plant and the more varied the requisite skills, the more prevalent it was for departmental or narrower (occupational or job classification, craft or line of progression) seniority units to be agreed to; and that the type of system was "generally determined by the requirements of plant operation."

INDEX

	Page
"Seniority Provisions in Collective Agreements", MLR December, 1938, 1250	1
"Workers' Attitudes in Work Sharing and Lay-Off Policies in a Manufacturing Firm", MLR, January, 1939, 47	12
"Collective Bargaining by United Rubber Workers", MLR, September, 1939, 604	15
"Union Agreements in Aircraft Manufacture", MLR, August, 1940, 290	19
"Union Agreements in Shipbuilding", MLR, September, 1940, 597	22
"Contract Clauses on Seniority as a Factor in Layoffs", 78 MLR 766 (July, 1955)	27

COMPANY EX. 25

MASTER AGREEMENT

BETWEEN

AMERICAN CAR AND FOUNDRY DIVISION
ACF INDUSTRIES, INCORPORATED

AND

UNITED STEELWORKERS OF AMERICA

November 4, 1965

WITH

ST. CHARLES PLANT SUPPLEMENT

ST. CHARLES PLANT

EXHIBIT "A"

Department No.	*Department Name*
102	Shear and Punch
103	Underframe
104	Steel Assembly
105	Steel Erection
106	Welding
107	Wheel and Axle
108	Iron Machine Shop
109	Blacksmith
110	Pulpwood Car Assembly
112	Steel Cabinet
113	Cabinet Mill
114	Sheet Metal
115	Coach Erection
116	Passenger Electric
117	Pipe
118	Finish
119	Paint
120	Trimming
121	Upholstering

122	Wood Cabinet
131	Template and Pattern
140	Machine Maintenance
141	Buildings and Yard
142	Shop Electric
144	Power Plant
148	Building Service
152	Finish Stores
154	Raw Stores
156	Tool and Parts Control
157	Material Transport
162	Loft
219	Resident-Maintenance
502	Aircraft Machine and Fabrication
504	Aircraft Tooling
505	Aircraft Assembly
514	Heat Treat and Hand Form
516	Aircraft Electrical
519	Anodize and Paint
561	Inspection

SUMMARY OF SENIORITY PROVISIONS IN ALL COLLECTIVE BARGAINING AGREEMENTS ON FILE WITH UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS IN INDUSTRIES IN STANDARD INDUSTRIAL CLASSIFICATION GROUP NO. 374 (RAILROAD EQUIPMENT) (EXCEPT PULLMAN-STANDARD)

Employer	Location	Union	Dates	Brief Description of Seniority System
Evans Products Co.	Plymouth, Mich.	USW	9/1/65	HYBRID OF PLANT, CLASSIFICATION AND DEPARTMENT SENIORITY *
ACF	Hamilton, W. Va.) Milton, Pa.) St. Charles, Mo.)	USW	11/4/65	DEPARTMENTAL OR BY UNITS THEREOF
GATX	East Chicago, Ill.) Plants 1 and 2) Sharon, Pa.) Argentine, Kans.) West Colton, CA) Hearne, Texas) Wayeross, Ga.)	USW	9/15/71	DEPARTMENT OR BY UNITS THEREOF
Youngstown Steel Door Co.	Youngstown, Ohio	USW	10/1/71	DEPARTMENTAL
ACF	East St. Louis, Ill.) Milton, Pa.) Red House, W. Va.)	USW	8/5/72	PLANT WIDE IN LAYOFFS AND RECALLS, Provided Employee has ability to do the work. PLANT WIDE IN FILLING VACANCIES, Provided Employee can qualify in the new Classification during a 30-day trial period, during which he is paid at his old rate.
Westinghouse Air Brake Division, Office & Technical Employees	Wilmerding, Pa.	Independent	11/1/72	"SECTION" or "PAYROLL NUMBER" (evidently means Occupational or Classification Basis)
Westinghouse Air Brake Division, P & M	Wilmerding, Pa.	UE Local 610	11/1/72	"SECTION" (evidently means departmental or subunit thereof)
New York Air Brake Co.	Watertown, NY.	Molders Local 78	2/14/73	DEPARTMENTAL
Greenville Steel Car Co.	Greenville, Pa.	UAW Local 1653	4/19/73	DEPARTMENTAL
Winder Transportation Systems, Inc.	Winder, Ga.	IAM Lodge 2	5/1/74	OCCUPATIONAL—Departmental preference in promotions

* Plant-Wide seniority for 10 designated "Basic Jobs", i.e., unskilled. All vacancies in "Non-Basic" (semi-skilled and skilled) jobs filled first by employees having certain minimum experience in those jobs. Where such experienced employees not available, departmental seniority applies in filling temporary (2 weeks or less) vacancies in Non-Basic jobs and in filling permanent vacancies in Non-Basic jobs plant-wide seniority applies provided senior bidder can do the available work in the classification, as demonstrated by a 5-day trial period—which is not a training period.

COMPANY EX. 26—SECOND DOCUMENT

AGREEMENT

BETWEEN

EVANS PRODUCTS COMPANY

AND

UNITED STEEL WORKERS OF AMERICA

September 1, 1965

• • • •

Section 4. There shall be one (1) Steward for each shift in the following departments except as otherwise indicated:

Dept. 10—Machine Shop.

Dept. 21—Loading Equipment—Two (2) Stewards.

Dept. 21—Car Building & Installation—Two (2) Stewards.

Dept. 29 and 30 combined—Shears and Press Room.

Dept. 31—Spot Welding.

Dept. 32—Paint.

Dept. 33—Final Assembly.

Dept. 40—Tool Room.

Dept. 41-1—Receiving.

Dept. 41-2—Stock Room—Two (2) Stewards (one Steward from among employees working indoors and the other from among employees working outdoors).

Dept. 41-3—Lift Truck Operations.

Dept. 42—Inspection.

Dept. 45—Shipping.

Dept. 46 and 195—combined.

Dept. 48—Maintenance—Two (2) Stewards (one from among General Maintenance and the other from among Sweepers and General Workers).

Dept. 49—Tool Crib.

Dept. 66—Experimental.

• • • •

COMPANY EX. 26—THIRD DOCUMENT

AGREEMENT

BETWEEN

GREENVILLE STEEL CAR COMPANY

AND

THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

Local Union No. 1653

Greenville, Pennsylvania

April 19, 1973

To

April 19, 1976

[UNION BUG]

* * * *

Section 12

a. The following is a list of the separate departmental seniority rosters. An employee's departmental seniority shall be based upon his length of continuous service within a recognized department:

(1) Wheel, Axle and Truck Shop

(2) Crane Operators

(3) Electrical Maintenance

(4) Erection Shop

(5) Forge Shop

(6) Hook-on

(7) Tool & Die Department

(8) Die Yard

(9) Mechanical, Tool Room and Power House (Millwrights)

(10) Paint Department

(11) Pattern and Template Shop

(12) Pipe Department

(13) Fabrication Department

(14) Stores Department

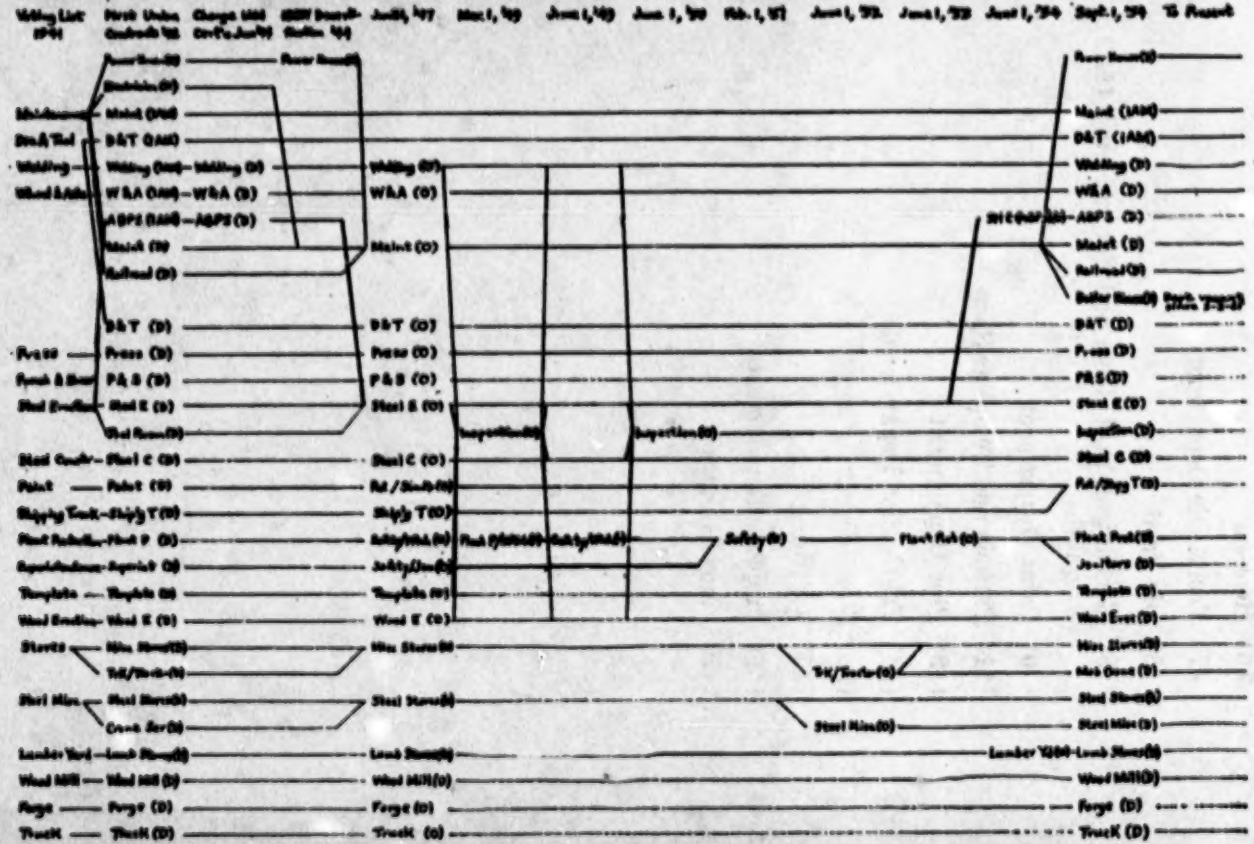
(15) Switching

(16) Property Department

(17) Plant Janitors

• • • •

DEPARTMENTS, BARGAINING UNITS, AND SENIORITY SYSTEMS AT PULLMAN BESSEMER PLANT, 1941 – PRESENT. COMPANY DEFENDANT'S EXHIBIT 27.



Key: (I)= NEW Bargaining Unit; (IAM)= IAM Bargaining Unit; (D)= USW Unit, Departmental Seniority; (O)= USW Unit, Occupational Seniority.

DEPOSITIONS INTRODUCED AT 1978 TRIAL

DEPOSITION OF JOHNNY JOSEPH MAUTMAN HERRING

[10] Q All right. The contract will show that in 1941, the National Labor Relations Board certified bargaining unit for the machinists, which included the production and maintenance welders.

I believe you came to work there the next year; is that correct?

A That's right. In 1942.

Q That's correct.

Now, the contract further shows that on June 14, 1944, the machinists union, and the Steelworkers Union, made an agreement whereby the welders and certain other employees who were then in the machinist department would become members of the Steelworkers bargaining unit. Do you recall that agreement?

A Yeah, but I want to put you straight there.

Q O. K. Would you tell me about that?

A Now, the time you are talking about, you know, we were striking, might not be every month, but sometimes two or three times a day and two or three times a month.

Q Now, who was striking at that time?

A We were trying to get organized, get us a [11] union.

MR. FALKENBERRY: He is asking you what group of people you are talking about, Mr. Herring.

A I'm talking about the P and M workers.

Q All right.

A And then when we organized and all, well, then we come up here to Birmingham and in the First National Bank Building, Pullman owned or had leased one floor down there, and Bill Sleeman, he was plant manager, and we was all down there. They had been coming across

our picket line and the machinists then got down there, and we said this, that, and the other, and said, well, we are going to take who we want, not what you want to give us.

Q Who did you tell it to?

A Told them to the boss that was around the table with us. And said, well, what do you want then? We told them we would take everyone excusing the millwrights. If you want me to tell you exactly what we said, I can tell you.

Q All right. What did you say?

A I said we didn't want them scabbing son-of-a-bitches, they come across our picket line.

[12] Q All right.

A And then we left out of that First National Bank and went to the Post Office, and old Judge, Federal Judge in there with us, old man Sleeman and Johnson was doing a little whispering going on, and old Judge told them, said, listen, you whisper out loud because I'm the man going to make the decision today, and I want to hear what's going on. And that's when we took who we wanted and give them the rest of them.

* * * *

DEPOSITION OF COLON V. CLEMONS

• • • •

[4] COLON V. CLEMONS,

being first duly sworn, was examined and testified as follows:

EXAMINATION BY MM. CLEMON:

Q Mr. Clemon, will you state your full name?
A Colon V. Clemons.
Q And what is your address?
A 3217 Circle Drive, Hueytown.
Q Where are you employed?
A Pullman-Standard, Bessemer.
Q And what is your position at Pullman-Standard?
[5] A Department head, die and tool.
Q That's the die and tool IAM Department?
A That's right.
Q How long have you been department head?
A Eight years.
Q How long have you worked in the die and tool department?
A Since May of '41.
Q What was your position before you became head of the department?
A I started off laboring, sweeping the floor, progressed ot craneman and machinist.
Q All right. Now, Mr. Clemon, when you first came into the die and tool department, in May of '41, there was no union, was there?
A That's right.
Q Did you participate in the organizing effort?
A I joined when they formed the union.
Q All right. Did you join after the union had been certified in the latter part of '41?
A I think so. As I recall, it was September of '41 when they formed the union and I joined at that time.

[6] Q Were there any black members in the union at that time?

A Not at that time, no, sir. Could have been, I didn't know about it.

Q Did you go to any of the union meetings?

A Yes, I went to one or two meetings.

Q Did you see any blacks there?

A I don't recall.

Q Do you ever recall seeing any?

A No.

Q Were you familiar with the fact that the truck department was initially included in the IAM bargaining unit at Pullman?

A No. See, it was formed in September, as I recall, and I went off, was laid off April of '42 and went into World War II, and was gone for three and a half years and didn't return until '46.

Q You say you left in April of '42?

A Yes, sir.

Q All right. There is a letter dated December 19, 1941. You were in the die and tool department there, weren't you?

[7] A That's right.

Q There is a letter signed by Mr. Bumgardner. Did you know him?

A Yes. Bumgardner, yes, sir. He was business agent.

Q Yes. All right. He signed a letter along with Representative of the Steelworkers organizing committee, which, among other things, transfers the truck shop from the IAM unit into the Steelworkers unit. Were you familiar with that?

A No, sir.

Q Did you know that at that time the employees in the truck shop were black?

A No, I don't recall that.

Q You were familiar with the truck builders, weren't you?

A Yes, sir.

Q They were black?

A Yes, sir.

• • • •

DEPOSITION OF CLYDE A. ROBERTSON

* * * *

CLYDE A. ROBERTSON,

being first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. CLEMON:

Q Mr. Robertson, would you state, for the record, your full name?

A Clyde A. Robertson, R-o-b-e-r-t-s-o-n.

Q And you are employed by Pullman-Standard?

A Yes, sir.

Q And what is your position with Pullman-Standard?

[6] A Contract compliance officer.

Q And what does that entail?

A Well, it's the handling and overseeing of the Civil Rights activities, Affirmative Action Program; basically, that's it.

Q O.K. Mr. Robertson, you worked with the lawyers for the company in both answering the interrogatories, which the plaintiff filed to the company, and in responding to plaintiff's request for production, did you not?

A That's correct.

* * * *

[12] Q All right. Mr. Robertson, in your study of company records, in responding to our request for production, and in answer to our interrogatories, did you come across any documents which reflect any negotiations between the company and the Steelworkers Union, with respect to the creation of a separate seniority list or department for the boiler house?

[13] A Nothing, no negotiations, no, sir.

Q All right. Is it also true with respect to inspection?

A Yes, uh huh.

Q The janitor's department?

A Yes.

Q Mobile crane? Is that correct?

A Yes, sir.

Q The creation or merger of the shipping track with the paint department?

A That's correct, nothing to show negotiations or anything like that.

Q Also true with respect to the plant protection department?

A That's correct.

Q And the railroad department?

A Yes, sir.

Q And the steel miscellaneous department?

A Yes.

Q Well, I take that back.

I believe there is one document or maybe two which shows that there was agreement between the company and the union to create steel miscellaneous [14] department out of, or to carve it out of steel storage department?

A I think those were—

Q Those were supplied to me?

A Yes.

* * * *

[15] Q All right. Do you recall whether there was any negotiations, or have you seen any records reflecting any negotiations with respect to the creation of the truck and tractor department in the first place?

A No.

Q Do the records that you have seen indicate what disposition was made of the superintendents department?

[16] A No. No records other than the people that were in the superintendents department went into other departments, like the inspection people that were in there became part, later on in later years, part of the

inspection department. I can't recall the other people in that department.

• • • •

[20] O.K. You do know that within two months after the IAM was certified, with the truck shop included in the bargaining unit, that the IAM had arranged with the Steelworkers to transfer the truck shop from the IAM to the Steelworkers?

A No. I don't recall that.

Q You don't recall that?

A No.

MR. DAVIS: Mr. Clemon, there have been a great number of documents in this case and would be more people that just Mr. Robertson that pulled them. In fact, I pulled a number of them myself, so Mr. Robertson might not have seen all of the documents and maybe other documents, although I'm certainly not saying there are any documents of the nature you are suggesting.

Q All right.

A Now, I can't recall everything that I saw, [21] let alone some of it that I may not have seen.

• • • •

Q And at one time the boiler house, railroad, power house employees were all carried on maintenance CIO seniority list, were they not?

A That's correct.

Q And, therefore, under a departmental seniority system, employees in the maintenance department, black and white alike, would have been able to move up to these jobs in power house, boiler house, railroad; is that not correct?

A Under a straight departmental seniority system.

[22] Q Which is what you now have at Pullman?

A Yes, by and large, yes.

Q Now, the effect of creating these new departments or cavring out these new departments from maintenance

CIO was to create some department into which employees otherwise eligible to get certain jobs as power house operators, would no longer have a right to get those jobs; is that not correct?

A You are asking me if that's what was done to take people's rights away, I don't know what was done.

Q No. I'm not asking you for the motivation, Mr. Robertson; I'm asking you for the effect.

When the power house jobs were taken out of maintenance CIO and placed in a separate department, did that not mean that some person, and I'm particularly interested in the blacks who were in maintenance CIO, who might otherwise have been entitled to jobs in the power house, no longer had a right to get those jobs?

A Not in the same way had they been in the maintenance department.

Q They would have to have transferred to the [23] power house in order to—

A Right.

Q And there was no right of transfer. They could request it and the company could grant it if it saw fit?

A That's correct.

MR. DAVIS: Mr. Clemon, are you speaking now without reference to the Affirmative Action Agreement?

MR. CLEMON: Right. I'm speaking now about things a little prior to 1965.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 71-P-0955-S

LOUIS SWINT, *et al.*,
Plaintiffs,

vs.

PULLMAN-STANDARD, A Division of Pullman, Inc., *et al.*,
Defendants.

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Come now the plaintiffs in the above cause and move this Court, pursuant to Rule 201(b)(d) and (f) of the Federal Rules of Evidence, to take judicial notice of the following facts:

1. In the case of *Terrell, et al. vs. U.S. Pipe and Foundry, et al.*, No. 27-887-P, N.D. Ala., presently pending before this Court, the defendant International Association of Machinists ("IAM") stated that until 1948, the IAM Ritual contained a clause that the [members] would propose for membership only "qualified white candidates." See Answers of IAM to Plaintiffs' Interrogatories No. 7, filed March 4, 1974, a certified copy of which is attached hereto.

2. In the same case, the defendant International Association of Machinists stated that its 1940 bargaining unit at United States Pipe and Foundry Company's plant located in Bessemer, Alabama, consisted of "machinists, apprentice machinists, toolmen, crane hookers, blacksmith shop employees, welders, apprentice welders and welders' helpers." Id., Answer to Interrogatory No. 1; copy attached hereto.

WHEREFORE, the premises considered, plaintiffs pray that the Court will take judicial notice of the said facts.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. 72-887

JOSEPH TERRELL, JR.,
Plaintiff,

v.

UNITED STATES PIPE & FOUNDRY COMPANY, *et al.*,
Defendants.

Mar. 4, 1974

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

Comes now the defendant, International Association of Machinists and Aerospace Workers, AFL-CIO, and Lodge 359 (hereinafter the "Grand Lodge" or the "International") and for Answer to the plaintiff's Interrogatories says as follows:

1. Yes, both are separate labor organizations. The I.A.M. was certified as the bargaining representative in 1940 for "machinists, apprentice machinists, toolmen, crane hookers, blacksmith shop employees, welders, apprentice welders and welder's helpers."

2. John R. Tucker (white)
District Lodge Business Agent, I.A.M.
110 West 13th Street
Anniston, Alabama 36201

Represents L.U. at 3rd step of grievance procedure.
Represents L.U. in negotiations.

M. C. Hosmer, President (white)
Route 1, Box 179
McCalla, Alabama 35111

7. Neither the Constitution nor the By Laws have ever excluded blacks or members of any minority race. Prior to 1948 the Ritual did contain a clause stating that the applicant would propose for membership only "qualified white candidates." This was dropped in 1948. There have been no such qualifications since.

8. A. The Ritual of the I.A.M.
   B. Unknown. Probably 1888.
   C. 1948.

* * * *

11. The Local has never refused to accept a black employee's application for membership.

* * * *

(c) Membership has not been limited to whites only. No blacks were assigned to the I.A.M. bargaining unit until 1969.

* * * *

A true copy of pages 1-3 of Defts' Answers to Plfts' interrogatories total of 7 pages with exhibits)

JAMES E. VANDERGRIFT
Clerk
United States District Court
Northern District of Alabama

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA BIRMINGHAM DIVISION

Civil Action No. 72-887

JOSEPH TERRELL, JR., ALBERT MASON, MARCUS OAKES, SAM WALKER, JOHNNY LONG, THOMAS GREEN, WALTER DUDLEY, each individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

UNITED STATES PIPE AND FOUNDRY COMPANY, a corporation; UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association; LOCAL 2140, UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association; INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, an unincorporated association; LOCAL 342, INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, an unincorporated association; PATTERNMAKERS LEAGUE OF NORTH AMERICA, AFL, an unincorporated association; PATTERNMAKERS ASSOCIATION OF BIRMINGHAM, an unincorporated association; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, an unincorporated association; LODGE 359, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, an unincorporated association; BROTHERHOOD OF BOILERMAKERS, BLACKSMITHS, FORGERS AND HELPERS, an unincorporated association; LOCAL 583, BROTHERHOOD OF BOILERMAKERS, BLACKSMITHS, FORGERS AND HELPERS, an unincorporated association; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, an unincorporated association; LOCAL 136, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, an unincorporated association,

Defendants.

Dec. 7, 1973

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANT UNIONS

* * * *

7. State whether the Constitution or By-Laws of the International Machinists and Aerospace Workers have ever contained provisions excluding persons or limiting or qualifying membership on the basis of race or color.

8. If the answer to Interrogatory No. 7 is affirmative, state:

(a) The document in which the provision is or was contained, its precise location and its custodian;

(b) the date of its original enactment or exercise;

(c) the date of its expiration or repeal, if any;

* * * *

11. State whether Local 359 or any other Local chartered by the International Association of Machinists and Aerospace Workers at U.S. Pipe . . . (Interrogatory continued on next page of document, but that page is not in the record].

Office-Supreme Court, U.S.
FILED
MAR 19 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1190, 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated,
Petitioner, No. 80-1190,

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners, No. 80-1193,

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*,
Respondents.

BRIEF IN OPPOSITION

JACK GREENBERG
JAMES M. NABRIT, III
JUDITH REED
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

ELAINE R. JONES*
BARRY L. GOLDSTEIN
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005

OSCAR W. ADAMS, III
2121 Eighth Avenue, North
Birmingham, Alabama 35203

Attorneys for Respondents

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

ARGUMENT

I. IN HOLDING THAT THE SENIORITY SYSTEM WAS UNLAWFUL, THE FIFTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISION IN TEAMSTERS v. UNITED STATES 8

II. IN REVIEWING THE DISTRICT COURT'S DECISION, THE FIFTH CIRCUIT PROPERLY DISCHARGED ITS FUNCTION UNDER RULE 52(a) IN A MANNER CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER CIRCUITS 21

III. IN CONCLUDING THAT THE COMPANY UNLAWFULLY DISCRIMINATED IN THE SELECTION OF SUPERVISORS, THE FIFTH CIRCUIT FOLLOWED THE PRINCIPLES ESTABLISHED BY THIS COURT IN A MANNER CONSISTENT WITH THE APPLICATION OF THESE PRINCIPLES BY OTHER CIRCUITS 29

CONCLUSION 34

TABLE OF AUTHORITIES

Cases	Page
Asbestos Workers Local 53 v. Volger, 407 F.2d 1047 (5th Cir. 1969).....	33
Baumgartner v. United States, 322 U.S. 665 (1943)	22
Bostic v. Boorstin, 617 F.2d 871 (D.C. Cir. 1980)	29
Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975)	22
Dayton v. Bd. of Educ. v. Brinkman, 443 U.S. 526 (1976)	24,27
Duckett v. Silberman, 568 F.2d 1020 (2nd Cir. 1978)	28
East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975)	22
EEOC v. Chesapeake & Ohio Ry. Co., 577 F.2d 229 (4th Cir. 1978)	28
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	7,33
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	passim
Kelley v. Southern Pacific Co., 419 U.S. 318 (1974)	25

Page

Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973) 17

Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) 28

Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 20

National Labor Relations Board v. Pittsburgh S.S. Co., 337 U.S. 656 (1949) 27

Norris v. Alabama, 294 U.S. 587 (1934)... 23

Pack v. Energy Research & Development Administration, 566 F.2d 1111 (9th Cir. 1977) 28

Silberhorn v. Gen. Iron Works Co., 584 F.2d 970 (10th Cir. 1978) 29

Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979) 28

United States v. Board of School Comm'rs, 573 F.2d 400 (7th Cir.), cert. denied, 439 U.S. 824 (1978) 17

United States v. General Motors, 384 U.S. 127 (1966) 23,25,26

United States v. Johnston, 268 U.S. 220 (1925) 7

Page

United States v. Oregon State Medical Society, 343 U.S. 326 (1952) 26

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 25

United States v. U.S. Gypsum Co., 333 U.S. 365 (1948) 7,22

United States v. Yellow Cab Co., 338 U.S. 341 (1949) 26,27

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) 17

Washington v. Davis, 426 U.S. 229 (1976).. 11

OTHER AUTHORITIES

Civil Rights Act of 1866, U.S.C. §1981 ... 2

Rule 52(a) Fed.R.Civ.P. 6,23,25

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e 2,8,14

Nos. 80-1190, 80-1193

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated,

Petitioner, No. 80-1190,

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners, No. 80-1193,

v.

LOUIS SWINT and WILLIE JOHNSON, et al.,

Respondents.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondents, on their own behalf and on the behalf of other black employees, filed this suit against Pullman-Standard (the "company"), the

United Steelworkers of America and its Local 1466 ("Steelworkers" or "USW") and the International Association of Machinists ("IAM")[1/] asserting violations of Title VII of the Civil Rights Act of 1964 (as amended 1972), 42 U.S. C. § 2000e and the Civil Rights Act of 1866 U.S.C. § 1981. Pullman-Standard and the Steelworkers have each filed a petition for a writ of certiorari.

The district court found that there was a "segregation of jobs [at the Bessemer plant of Pullman-Standard] prior to March 1965 - which certainly must be taken as an employment practice and policy, whether or not ever formally approved by company and union .... If all the jobs of a department wre 'consigned' to employees of the same race, the department was, of course, totally segregated...." A 197.[2/] Both courts below held that racial segregation was practiced in every conceivable aspect of employment at the Bessemer

---

1/ By pretrial order, leave was granted to add IAM as a defendant for the purpose of enabling the court to fashion a full remedy. See App. A, one of two apprendices to this Brief.

2/ "A" refers to the "Appendix to Petition for Writ of Certiorari" submitted by Pullman-Standard.

plant.[3/] The Fifth Circuit also ruled that "racial segregation was extensively practiced at Pullman-Standard [and] in the union hall...." A 168. The pre-1965 discrimination covered assignments to jobs "in varying degrees [in] virtually every department." A 106-107.[4/]

The major issues litigated in the lower courts concerned whether the discriminatory

---

3/ The district court made the following findings:

> Bathhouses, locker rooms, and toilet facilities were racially segregated. Company records - including employee rosters, internal correspondence, records of negotiation sessions, lists of persons picketing - included racial designations. In 1941 some of the 'mixed' jobs even had different wage scales for whites and blacks. All of the Company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated. (A 142.)

4/ In its petition (p. 6), the company misrepresents the district court's finding on discriminatory assignments by referring to its 1974 opinion. In its later opinion, which is the subject of this proceeding, the court reversed its position, see A 106-97.

assignments to production and maintenance jobs[5/] and discriminatory supervisory selection procedures continued during the period covered by this lawsuit and whether the seniority system was unlawful. Trial proceeded on three separate occasions. The initial 1974 trial lasted 16 days. The district court concluded that the company and unions had not engaged in unlawful practices A 1-44), but the Fifth Circuit vacated the decision and remanded the case for further trial proceed-

---

5/ Neither the company nor the union raise the issue of post-Act discriminatory assignments in their statement of questions presented. Nevertheless, the company, in its statement of facts, maintains that the Fifth Circuit wrongly concluded that assignments were made on a discriminatory basis after 1965. Co. Pet. 18-20. This is in flat contradiction to its own admission that during this period 47 whites and 3 blacks were assigned to the Die and Tool (IAM) department, Co. Pet 18. These statistics demonstrate the discrimination even more clearly than those upon which the Fifth Circuit relies. They also illustrate the correctness of the Fifth Circuit's holding that the district court, in the company's own words, erred "in counting." Co. Pet. 20. Compare A 108-09 with a 162-63; see also PX 2-8, which support the Fifth Circuit's conclusion that there was discrimination in assignment.

ings. A 45-99. A second trial was held over two days in February 1977. The district court delayed ruling until after this Court rendered its decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and then, once again held that no unlawful pratices had been committed. A 100-23. The plaintiffs moved for a new trial because Teamsters had altered the legal standard for determining the validity of a seniority system and, accordingly, there had been no evidence presented in the prior two trials relating to the bona fides of the seniority system. The district court agreed (A 134-27), and an evidentiary hearing was held. The hearing on the Teamsters issue lasted less than a day and oral testimony was presented by only two witnesses.[6/] The oral testimony was limited, but extensive documentary evidence was presented covering the institution, development and maintenance of the seniority system from 1941 to the present.

The district court found that the system was "bona fide" and lawful even though it adversely

---

6/ See, infra, Argument, Pt. II.

affects the employment opportunities of black workers. A 128-52. The Fifth Circuit reversed because "[a]n analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made" [footnote omitted]. A 170. The Fifth Circuit also held that the lower court erred in concluding that the company had not discriminated in the assignment of employees and in the selection of supervisors. A 153-79.

REASONS FOR DENYING THE WRIT

The questions presented by the Steelworkers and Pullman-Standard challenge the Fifth Circuit's ruling on seniority.[7/] The company also challenges the Fifth Circuit's ruling on the selection of supervisors. The petitions are not due to be granted because they present no conflict of

---

7/ One of the questions presented by the Steelworkers is cast in terms of Rule 52(a), Fed. R. Civ. P.

decisions among the circuits[8] and because they present no conflict with decisions of this Court.[9] Moreover, the decision of the Fifth Circuit reaches a proper result on the facts of this case. In any event, the Fifth Circuit opinion raises no important or new issues of law but rather applies this Court's decisions in Teamsters v. United States, supra, and Griggs v. Duke Power Co., 401 U.S. 424 (1971), to a complex factual situation (Sections I and III, infra).[10]

8/ The company does not even assert that the case presents a conflict of decisions. The Steelworkers erroneously assert that the Fifth Circuit's application of Rule 52(a) conflicts with the application of the Rule by other circuits. The Fifth Circuits's decision not only is consistent with decisions of other circuits but also expressly follows a seminal decision of this Court, United States v. U.S. Gypsum Co., 333 U.S. 364 (1948), interpreting Rule 52(a). See Section II, infra.

9/ As described in the Argument, the asserted conflicts disappear when this Court's opinions are properly applied to this case.

10/ Essentially petitioners ask this Court to perform the appellate court function of "review-[ing] the evidence and discuss [ing] specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

ARGUMENT

I.

IN HOLDING THAT THE SENIORITY SYSTEM WAS UNLAWFUL, THE FIFTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISION IN TEAMSTERS v. UNITED STATES.

This Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), neither condemned nor condoned all seniority systems which perpetuate the effects of pre-Act discrimination. Id. at 353-55. "To be sure, §703(h) does not immunize all seniority systems," id. at 353. Section 703(h) covers only "bona fide" systems; it specifically excludes any system in which differences in treatment are "the result of an intention to discriminate because of race...." 42 U.S.C §2000e-2(h) In ruling that the system in Teamsters was protected by § 703(h) the Court examined several factors: whether the system "applies equally to all races," whether it is "in accord with the industry practice and consistent with National Labor Relations Board precedents," whether it had "its genesis in racial discrimination," and whether "it was negotiated and has been maintained free from any

illegal purpose." 431 U.S. at 355-56; 346 n.28.[11/] The Fifth Circuit applied these Teamsters factors to the particular employment context presented at the Bessemer plant.[12/]

1. Neutrality. The undisputed evidence establishes that the traditionally all-black departments have the lowest median job classes at the Company; the traditionally white departments (with two exceptions) have among the highest median job classes. The district court recognized that the "No transfer with seniority carryover" rule has the likely effect of discouraging a disproportionate number of black employees from

---

11/ Application of these factors by the Fifth Circuit necessarily required a careful review of the record. While respondents are reluctant to burden this Court with a factual recital, both petitions were riddled with statements that are directly contrary to the record. Respondents, therefore, are constrained to set forth the record facts on the seniority system, which appear in Appendix B to this brief (App. B).

12/ The Steelworkers claim the the Fifth Circuit's decision "robs §703(h) .. of the content which this Court ... found that Congress meant to give it." USW Pet. 23. On the contrary, the Fifth Circuit followed the balanced approach which this Court applied in Teamsters.

[This Page Intentionally Left Blank]

transferring, if the relative economic desirability of the departments is considered. A. 134. However, the Court felt it "inappropriate" to consider economic desirability, and found the system to be neutral because in effect, it locks white employees out of the lower-paying black departments to the same extent that it locks black employees out of the higher-paying departments. It disregarded the distinction that in Teamsters, the employees who were "discouraged from transferring ... [were] not all Negroes and Spanish-surnamed Americans [but] the overwhelming majority [were] white." 431 U.S at 356.

Here the evidentiary facts are not in dispute and the Court of Appeals properly reversed the district court, which committed legal error in failing even to consider the inference of intentional racial discrimination raised by the fact that the seniority system excluded blacks from higher-paying departments.[13/] A 165-166, see

---

13/ The Steelworkers distort the Fifth Circuit's statement that blacks were excluded by the first Steelworkers' contract from "better jobs." USW Pet. 16 n.9. The Fifth Circuit was referring to the fact that the departmental system was established by the contract and that there were several

Washington v. Davis, 426 U.S 229, 242 (1976) ("[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if true, that the law bears more heavily on one race than another").

2. Rationality. It is undisputed that unionization and creation of the seniority system resulted in the separation of two racially mixed operational departments, the Die and Tool Department and the Maintenance Department, into four separate seniority units, including three one-race departments, A 136, A 166; App. B 9. The lower-paying jobs consigned to blacks were included in the Steelworkers unit while the higher-paying

---

13/ continued

all-white departments. The requirement that an employee forfeit seniority upon transferring departments (A 131, 158), served as a bar to transfer and thus excluded blacks from the better paying jobs in the all-white departments. The Steelworkers further erroneously criticize the Fifth Circuit in stating that it wrongly referred to a "no transfer rule." USW Pet. 17 n.9. The Fifth Circuit did not "substitute" its judgment for that of the district court, but rather expressly adopted the lower court's appropriate characterization of the seniority forfeiture provision. Compare A 134 to A 158.

jobs were included in the IAM unit. The district court failed to consider the irrationality of dividing operational departments into separate units because this "separation into differing bargaining units was not merely, as in Teamsters, 'consistent with National Labor Relations Board precedents, ...;' it was rather required by a specific decision of the NLRB and the outcome of the elections." A 140. The Fifth Circuit ruled that the district court had once again erred as a matter of law by refusing to consider whether the division of these operational departments into racially segregated seniority units was motivated by race. A 166, A 169. Teamsters did not state, as the district court infers, that whenever a unit-system is certified by the NLRB it has an imprimatur of racial neutrality.[14/] Moreover,

---

14/ Teamsters did not involve, as this case does, the development of separate bargaining units in a specific plant. Teamsters involved the division of jobs, over-the-road and city drivers, into separate seniority units in a manner which was consistently applied throughout the industry. In this case, the IAM with the cooperation of the Steelworkers and the company entered into a series of maneuvers designed to accomplish one goal -- the establishment at the Bessemer plant of a one-race unit. App. B 6-8.

the company's and unions' creation of numerous one-race departments was not justifiable by any business reason; the only consistent thread passing through the development of these departments was race. App. B 9, 13.

3. Genesis. The seniority system had its genesis in 1941 and 1942 when the IAM and the Steelworkers sought and obtained bargaining units. In its petition to the NLRB the IAM sought to exclude Blacks from its bargaining unit. App. B 4-5. As an example, the IAM petitioned for inclusion of jobs such as crane operator, machine operator and handyman when staffed by whites but did not seek those jobs when staffed by blacks. Moreover, immediately after certification the IAM and the USW traded jobs along racial lines through a 1941 inter-union agreement. Having completed these racial maneuvers, which resulted in an all-white IAM bargaining unit, the unions, then entered into collective bargaining agreements with the company, which established a departmental seniority system.[15/] The district court erred as

---

15/ For evidence in the record which details the racially motivated agreement, or "clarification," between the USW and the IAM, see App. B 6-9; cf. Co. Pet. 12. In what we believe to be an irresponsible manner,--"the 'Alice in Wonderland'

a matter of law by ignoring the motives of the IAM in establishing an all-white bargaining unit[16/] and by failing to consider properly the 1941-42 genesis of the system. A 130, 142. The Fifth

---

15/ continued
quality of the Court of Appeals' inferences" -- the Steelworkers criticize the Fifth Circuit's conclusion regarding the 1941 transfer of jobs. USW Pet. 18 n.11. The Steelworkers, however, do not then refer to the 1941 trading of jobs between the unions, but to a wholly separate 1944 transfer. App. B 7, 10.

16/ The district court found it "unnecessary" to determine the motives of the IAM because "the [steelworkers and the company] cannot be charged with racial bias in its response to the IAM situation." A 145. The company and the Steelworkers make the same error. Co. Pet. 16; USW Pet. 8 n.3. The issue tried in the district court is simply whether the seniority at the Bessemer plant is bona fide, or more particularly, whether an intent to discriminate entered into its creation and development. 431 U.S. at 346 n.28.

If the system had its genesis in discrimination, then the protection of §703(h) does not apply and thus a court properly may order the removal of the adverse racial consequences of the system. Teamsters v. United States, supra, 431 U.S. at 349 (absent the protection of §703(h) the seniority system falls "under the Griggs rationale").

Circuit correctly stated that the "motives and intent of the IAM in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination." A 169. The Fifth Circuit properly relied upon the 1941 racially motivated agreement, in concluding that

> The IAM manifested an intent to selectively exclude blacks from its bargaining unit NLRB certification considerations notwithstanding....That goal was ultimately reached when maneuvers by the IAM and USW resulted in an all-white IAM unit. A 69-70. 17/

The unionization and the establishment of a contractual departmental seniority system in 1941-42 not only resulted in the establishment of the "seniority forfeiture" obstacle to transfer to the then existing four all-white departments,

---

17/ Although stating that the "objective facts are not greatly in dispute" (A 145), as they could not be since the facts are set forth in NLRB and company documents, the district court failed to consider this racially directed transfer because of its view of the applicable law. This inter-union swapping and maneuvering of jobs based on the race of employees in those jobs regardless of their functional relationship, contradicts the assertion of the company that the unions "had no real choice". Co. Pet. 22.

but more importantly resulted in doubling the number of one-race departments. [18/]

4. Maintenance. The racial consequences of the seniority system were maintained and indeed expanded by the parties to the collective bargaining agreements. Under those agreements, an employee foreits accumulated seniority when he voluntarily transfers from the bargaining unit of one union to the bargaining unit of another. The criterion used for seniority within the Steelworkers bargaining unit[19/] was "departmental" form 1942 through 1947, then "occupational" from 1947 through 1954, and then once again "departmental" after 1954. The 1954 seniority system at

---

18/ As a result of unionization and the subsequent inter-union agreement, five additional one-race departments were created. Once again the Steelworkers rely upon invective rather than upon a review of the record when they state that the Fifth Circuit's ruling that "a substantial number of one-race departments were established upon unionization" is "sheer invention." USW Pet. 16 n.9. The court below is correct. App B 8-9.

19/ As a result of the racial maneuverings by the IAM and USW in the creation of their respective bargaining units, and the negotiation of the "no-transfer rule", App. B 3-9, n. 13, supra, all the blacks at Pullman were concentrated in the USW unit.

the Bessemer plant remained "virtually unchanged throughout the next eighteen years of collective bargaining." A 131, 158; App. B 15.

The Fifth Circuit properly concluded that the "creation of the new departments in the years subsequent to unionization involved continued separation of the races." A 167. In examining the "gestalt of the system" the district court erroneously failed to examine the racial consequences of the departmental changes. A 140-41. In an employment context where race receives constant consideration in the allocation of jobs, employee badge numbers, etc., when a series of acts, such as the creation of new one-race departments, adds to the discriminatory consequences of the system then there is created an inference of segregative intent. See, Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266-67 (1977); Keyes v. School District No. 1, Denver, 413 U.S. 189, 207-08 (1973); United States v. Board of School Comm'rs, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978).

The departmental changes which occurred in 1954 at the time of the switch from occupational to departmental seniority show a clear pattern of

discrimination.[20] When the departmental structure once again, in 1954, became critical in establishing a worker's employment opportunity, as in 1942-47, five brand new, one-race departments were created within the USW unit.[21] App. B 13-14.

20/ Contrary to the representations of the union and the company, respondents have not challenged "departmental service,...as the measure of seniority", USW Pet. 5, nor a departmental system per se, Co. Pet. 23-25. What respondents have challenged on the facts of this case is the manner in which the seniority system was established and maintained at Pullman. Considerations of race permeated the establishment of the bargaining units, the creation of the departments and the genesis and maintenance of the system.

21/ One of the five was the Janitor Department. The Steelworkers assert that the separation of the job of janitors, a "black" job, from the job of watchman, a "white" job, occurred in 1952 (USW Pet. 9), concluding therefore that the separation did not harm the employment opportunities of blacks, since an occupational seniority system was in effect in the years 1947 to 1954. In fact, the separation occurred, as the Fifth Circuit concluded (A 167), in 1954, just prior to and in contemplation of, a shift to a departmental seniority system. See PX 2-7 which show the jobs in the Safety department for 1947-52, PX 8 which shows the jobs in the Plant Protection department in 1953 and PX 9 which shows the janitors in an all-black Janitors Department and the watchmen in an all-white Plant Protection department in 1954.

In conclusion, the Fifth Circuit correctly determined that the district court had wrongly applied the law, had failed to consider relevant facts, and had made clearly erroneous findings of fact. In applying Teamsters to the particular facts at the Bessemer plant,[22/] the Fifth Circuit reached the proper legal conclusion -- the seniority system was discriminatory and unlawful:

> We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the USW unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and the renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. (A 171).

The company also asserts that a question presented by this case is whether resolution of the issue on bona fides of a particular seniority system includes application of a "but for" test.

22/ Contrary to the Steelworker's assertions that this case has affected the "seniority expectation of over 2,000 employees ..." (USW Pet. 26), this plant was closed permanently in January 1981.

Co. Pet. 23. Nothing in Teamsters requires such a test. Teamsters held that a court must inquire into whether an intent to discriminate entered into the adoption and maintenance of a seniority system.[23/]

In any event, the question presented -- "whether ... a departmental seniority system would have been adopted ... even if there had been no racial aspect involved," Co. Pet. 25 -- is not posed by the instant case. The Fifth Circuit's opinion and the position of the respondents, (see n.20, supra), do not depend upon any per se criticism of "departmental" seniority but rather depend upon the specific application of seniority

---

23/ In Mt. Healthy v. Doyle, 429 U.S. 274 (1977), this Court articulated "a rule of causation" that had been utilized in "other areas of constitutional law [where] this Court ha[d] found it necessary to distinguish between a result caused by a constitutional violation and one not so caused." Id. at 286. The Mt. Healthy standard, developed for an individual case involving an allegation of a First Amendment violation is inapposite to the analysis of whether a seniority system is lawful under Title VII. This Court has set forth the applicable standard in Teamsters and the Fifth Circuit followed that standard.

to the gerrymandered departmental and unit structure at the Bessemer plant.[24/]

II.

IN REVIEWING THE DISTRICT COURT'S DECISION, THE FIFTH CIRCUIT PROPERLY DISCHARGED ITS FUNCTION UNDER RULE 52(a) IN A MANNER CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER CIRCUITS.

The Court of Appeals, after reviewing the record before it, concluded that:

24/ The company suggests that this Court grant certiorari to consider the question of whether Title VII requires a showing of causality, because there is a "current controversy" over this question. Co. Pet. 25 n.24. In support of this contention, the company cites three circuit court decisions, id. These cases, one involving a "no-beard" policy, another involving an individual alleging reverse discrimination and a third involving the alleged discriminatory discharge of an individual who had lied on his application, are inapposite. The question of whether those courts applied proper Title VII standards to the facts of those cases is not before this Court. In any event, those opinions present no conflict with the Fifth Circuit's opinion, nor are they even related to the issue of whether the seniority sytem is lawful.

> An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made.

A 170. This standard of review, articulated in the seminal decision of this Court in United States v. U.S. Gypsum Co., 333 U.S 365 (1948), is the one used.

The Steelworkers attempt to convince this Court that the Fifth Circuit's reasoning was based on the standard articulated in East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975). It is clear from the decision of the Court of Appeals that this is not so. The Court of Appeals cites East for the proposition, established long ago by this Court, that the ultimate conclusion of whether the entirety of the facts establishes a statutory violation is an appropriate determination for an appellate court to make. Baumgartner v. United States, 322 U.S 665, 670-71 (1943), followed in Causey v. Ford Motor Co., 516 F.2d 416, 420 (5th Cir. 1975); cf. USW Pet. 21 n.14. Thus the Court of Appeals properly notes that while appellate courts can overturn subsidiary facts only under the clearly erroneous standard,

they can, and indeed are under a duty to, make an independent determination of whether a violation of Title VII has been established.[25/] As this Court has recently noted, "the ultimate conclusion by the trial judge, [of violation of the Sherman Act], is not to be shielded by the 'clearly erroneous' test...." United States v. General Motors, 384 U.S. 127, 142 n.16 (1966)[26/]

Not only did the Court of Appeals follow the correct standards under Rule 52(a), but the district court here made numerous errors of

---

25/ See, Norris v. Alabama, 294 U.S 587, 589-90 (1934): "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied."

26/ The Steelworkers criticize a number of the conclusions reached by the Court of Appeals, see, e.g., USW Pet. 21 nn.9, 10, and 11. As we have shown earlier, their criticisms, based on distortions of the record, are totally unwarranted, as each of the Fifth Circuit's conclusions had abundant factual support in the record and was reached through an application of the correct legal principles. See supra nn.13, 21, 23, 26.

law,[27] and, as the Court of Appeals correctly

27/ The district court's erroneous view of controlling legal principles manifested itself in several distinct ways, including the following:

(i) The district court's failure, indeed refusal, to consider the motives of the IAM with regard to either genesis or maintenance, see supra, p.13-17, and n.16;

(ii) the district court's determination that whether the 1941-42 or 1954 period of time was selected for consideration of the genesis factor was inconsequential. See A 142; cf. App. B 3-9, 13;

(iii) the district court's apparent view that NLRB certification somehow insulated the system from a finding of irrationality; see supra, p. 12;

(iv) the district court's failure to consider the seniority system's exclusion of blacks from higher-paying departments, see supra p. 10 and n.13;

(v) the district court's failure to consider the creation and maintenance, through the collective bargaining process, of an ever-increasing number of one-race departments, see supra pp. 15, 18;

(vi) the district court's failure to consider the racial consequences of later changes to the seniority system, see supra, 16-18;

As did the district court in Dayton v. Bd. of Educ. v. Brinkman, 443 U.S. 526, 535-36 (1979), the district court "ignored the intentional maintenance" of a discriminatory seniority system.

noted, Rule 52(a) has no application "where findings are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand." A 178 n.6. See United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960); United States v. General Motors, supra, 384 at 142; Kelley v. Southern Pacific Co., 419 U.S. 318, 323 (1974).

In an attempt to bolster their argument, petitioners claim that the district court's conclusion was reached only after listening to "weeks of testimony." USW Pet. 16. As discussed in the Statement of the Case, the district court granted plaintiffs' motion for a new trial limited to the Teamsters issue. A 126. The hearing on that issue lasted less than three hours, during which time the district judge heard the testimony of only two witnesses.[28/] In other words, it

---

28/ These witnesses were called by respondents. Mr. Samuel Thomas, a black employee at the company since 1946, testified as to segregation in seating at the union hiring hall and at union sponsored social activities (Tr. 18-19), and the racial composition of union officers and negotiating groups (Tr. 23-24). The other witness, Mr. Willie James Johnson, also a long-time black employee, testified regarding the segregated seating (Tr.30), segregated facilities at the company and union

"was essentially a 'paper case.'" United States v. General Motors, supra, 384 U.S at 142 n.16[29/] The Steelworkers' reliance, therefore, on United States v. Yellow Cab Co., 338 U.S. 341 (1949) and United States v. Oregon State Medical Society, 343 U.S. 326 (1952) is misplaced. In both of those cases the resolution of issues of intent turned "peculiarly upon the credit given to witnesses by those who see and hear them." 338 U.S. at 342. This Court reaffirmed this view in Oregon State Medical Society, cited by the Steelworkers, who chose to eliminate a very relevant portion of the quote, which it reads in full as follows:

28/ continued

hall (Tr. 30-31), racial identity of various International representatives (Tr. 30), as well as the handling of grievances regarding racial discrimination. (Tr. 32-33). Neither witness was subjected to extensive cross-examination and neither petitioner attacks the credibility of these witnesses.

29/ The documentary evidence consisted of over 100 exhibits for plaintiffs (respondents) and 27 for defendants (petitioners).

> There is no case more appropriate for adherence to [Rule 52(a)] than one in which the complaining party creates a record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses. 341 U.S. at 332 (emphasis added).

Unlike the "ordinary lawsuit" that "depends for its resolution on which version of the facts in dispute is accepted by the trier of fact." U.S. v. Yellow Cab Co., 338 U.S at 341, quoting from National Labor Relations Board v. v. Pittsburgh S.S. Co., 337 U.S. 656 (1949), this case depends upon the correct application of Teamsters principles to facts culled from documentary evidence.[30/] Here, the Court of Appeals performed "its unavoidable duty ... and concluded that the District Court had erred. Dayton v. Bd. of Educ. v. Brinkman, supra 443 U.S. at 534 n.8.

30/ The Fifth Circuit has not held that the standards of Rule 52(a) do not apply to a review of findings on discrimination purpose, as the Steelworkers assert. USW Pet. 22. Further, there is no conflict between the Fifth Circuit and

30/ continued

any other circuit over the applicable standards, as the Steelworkers imply. Id. Here, the district court failed to consider properly documentary evidence because of its erroneous view of controlling legal principles, and the Court of Appeals correctly reversed. The cases cited by the Steelworkers (id.) did not involve crucial errors of law. In addition, those cases concerned individual discharge and promotion claims, that revolved around the testimony of witnesses, thereby invoking particularly the requirement of Rule 52(a) that "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." See EEOC v. Chesapeake & Ohio Ry. 577 F.2d 229, 233 (4th Cir. 1978) (depended on credibility of witness' testimony and the inference to be drawn from sharply conflicting evidence); Kunda v. Muhlenberg College, 621 F.2d 532, 544 (3rd Cir. 1980) (district judge had opportunity to observe principal witnesses); Duckett v. Silberman, 568 F.2d 1020, 1023 (2nd Cir. 1978) (credibility a major factor) and reviewing court noted, trial judge was there, "we were not"); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 109 n.1 ("...the opportunity for first-hand observation may be especially important in [a case] such as this, ..." but court goes on to note it would attempt to "detect infection from legal error ...."); Pack v. Energy Research & Development Administration, 566 F.2d 1111, 1113 (9th Cir. 1977) (involving opinion

III.

IN CONCLUDING THAT THE COMPANY UNLAWFULLY DISCRIMINATED IN THE SELECTION OF SUPERVISORS, THE FIFTH CIRCUIT FOLLOWED THE PRINCIPLES ESTABLISHED BY THIS COURT IN A MANNER CONSISTENT WITH THE APPLICATION OF THESE PRINCIPLES BY OTHER CIRCUITS.

The district court found that respondents had made out a prima facie case of discrimination with respect to promotions to supervisory positions, based on the statistics presented at trial:

> At the time of trial only some 10% of Pullman's salaried foremen were black, a figure which is substantially below that expected from the labor market - which ranges from 25 to 35% black, depending on the age group and area selected - or from Pullman's own work force - which ranges from approximately 45 to almost 50% black, depending upon the time selected.

30/ continued

testimony of plaintiff's qualifications; Bostic v. Boorstin, 617 F.2d 871, 875 (D.C. Cir. 1980) (district court required to resolve conflict in expert testimony); Silberhorn v. Gen. Iron Works Co., 584 F.2d 970 (10th Cir. 1978) (district court required to evaluate testimony of co-workers and supervisors regarding plaintiff's behavior).

A 110. The district court had also previously found that "[s]election of foremen has been largely a matter of subjective evaluation by an all-white group of supervisors, ..." A 26. The Court of Appeals, in its earlier opinion, agreed with the district court, holding:

> The appointment of supervisory personnel at Pullman-Standard is done totally subjectively. There are no established criteria for selection of new foremen. .... In 1966, the first black was promoted to one of the 431 existing salaried foreman positions. Four years later, there were only nine black salaried foremen while there were 151 white foremen. At the time of trial, there were 13 departments in which blacks had never been offered either salaried or temporary forman positions. Since 1966 and until the time of this trial there were at least 59 salaried formen vacancies. Only 12 of those were filled by blacks.

The company recognizes that classwide discrimination in promotion for foremen has been shown Co. Pet. 25; however, the company contends that the Court of Appeals erred in concluding that the company had failed to rebut the prima facie case. The company does not assert that the decision of the Court of Appeals conflicts with the decisions of this Court or with those of other circuits; rather, the company asserts that the Court of Appeals erred in two ways. First, by "refusing" to take into account evidence regarding

black refusals of supervisory positions. Second, by inquiring into whether the company had justified its practices under the business necessity doctrine. Co. Pet. 25-29. The company's petition is not due to be granted on either of these issues, because the first is not presented by the decision of the Court of Appeals, or the record in this case, and the second is already settled by decisions of this Court.

The Fifth Circuit did not state, as the company maintains, Co. Pet. 26, that refusals by black workers of company promotional offers could not be taken into account in rebutting a prima facie case of discrimination. In fact, the Fifth Circuit considered this evidence and concluded that, under the circumstances of this case, since black refusals of promotions were closely tied to the "very discrimination which the class members seek to eliminate," the defendant had failed to rebut the prima facie case. A 176.

The evidence established, and both courts found, that the company's practice was to make promotions to temporary foremen of any given department from employees already within that department. A 113 and A 171. The company now, for the first time, terms such a practice an

"imaginary requirement." Co. Pet. 29. Yet the company admits that only 3% of the promotions for foremen are not from the same department. Id.[31] Both courts below then considered whether this practice was justified by business necessity (A 113 and A 173).[32] The Court of Appeals held

---

31/ This figure may be compared to the finding of the district court that "[o]f the 415 monthly promotions reported from January 1969 through May 1974, 403 - or 97% - were appointments of a person when in the department." A 122 n.18. Apparently the company would require a finding that all, or 100%, of the promotions were from within the department, before it would be appropriate to use the term, "practice."

32/ The district court held that "[t]he restriction of such temporary promotions to persons working in the department is a bona fide occupational qualification, justified by business necessity." A 113. Because of the district court's intermingling of two separate and very distinct Title VII defenses, the Court of Appeals discussed the distinction between the two, correctly concluding that the bona fide occupational qualification exception was not applicable to cases involving race discrimination. A 174.

that in order for the company to rely on a procedure having a disparate impact on blacks, it must show that the procedure is justified by business necessity. A 174. In so holding, the Court of Appeals was following the principles enunciated by this Court in Griggs v. Duke Power Co., 401 U.S 424 (1971). 33/

33/ See also Teamsters, supra, 431 U.S. at 349. The company asserts that the business necessity defense is applicable only in cases involving a "test or screening device." Co. Pet. 29. This assertion is plainly wrong. As this Court noted in Teamsters "[o]ne kind of practice 'fair in form, but discriminatory in operation' is that which perpetuates the effects of prior discrimination." 431 US. at 349, citing as an example the nepotism requirement at issue in Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969). Id at n.32. Similarly, the requirement, at issue in the courts below, that a person have worked in the department prior to being promoted -- in effect a kind of "grandfather clause" -- automatically precluded the consideration of blacks who but for past discrimination, would have worked in a greater number of departments.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
JUDITH REED
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

ELAINE R. JONES*
BARRY L. GOLDSTEIN
806 15th Street, N.W.
Suite 940
Washington, D.C. 20005

OSCAR W. ADAMS, III
2121 Eighth Avenue, North
Birmingham, Alabama 35203

Attorneys for Respondents
*Counsel of Record

APPENDIX A

COURT: U.S. District Court, N.D. Ala., Sou. Div.

CASE : Swint, et al. v. Pullman-Standard, et al., CA 71-P-955

ORDER: Supplemental pre-trial conference held June 4, 1974.

1. Counsel. The following counsel were present: For plaintiffs, U. W. Clemon; for defendant Company, C. V. Stelzenmuller; and for defendant Steelworkers Union, John C. Falkenberry.

2. Class Action. The parties have made known certain facts to the court and have agreed that such facts may be considered by the court without formal hearing otherwise required under Rule 23. On the basis thereof, the court finds and concludes that the prerequisites of Rule 23(a) and 23(b)(2) are satisfied and that this action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company as production or maintenance employees represented by the United Steelworkers. The court concludes that individual notification of class members is unnecessary in this action under Rule 23(b)(2) but that it would be appropriate for a general notification of the pendency of this litigation to be posted at the premises of the Company. Counsel for the parties shall attempt to draft such a notification and in the event of disagreement the same shall be presented to the court for its approval.

3. Parties. Leave is hereby granted to the plaintiffs to add as additional party defendant (insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company, it being noted however that no request for monetary relief is being sought against said Union) the appropriate entity of the International Association of Machinists. Leave is also granted for the intervention as a party plaintiff of an employee by the name of Humphrey for the presentation of his claim under Section 1981 with respect to his discharge and subsequent reinstatement without back pay.

4. Issues. The following charges are made by the plaintiffs as violations of either Title VII or of Section 1981:

(a) That a system of departmental seniority, even with changes made pursuant to a corrective action program with the Department of Labor, nevertheless perpetuates the effects of past discrimination in the assignment of black employees to generally less desirable departments. This issue subsumes the following assertions by the plaintiffs:

The transfer provisions under the agreement with the Department of Labor apply to only four departments; the transfer rights which are granted under such plan are inadequate by reason of the failure to provide red-circle rates and by reason of the restriction to a single exercise of such rights; and such rights of transfer do not apply to jobs in the machine shop represented by the IAM. (The issue relative to the machine shop may have to be severed for subsequent trial depending upon the joinder, service, and availability and readiness of the IAM with respect to the trial date already scheduled.)

(b) The Company has discriminatorily made assignments of functions to persons serving in the same job classification based on race and has discriminatorily assigned persons on the basis of race to "lateral" job classifications having the same job class.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

JUN 5 1974

WILLIAM E. DAVIS
CLERK, U. S. DISTRICT COURT
By _____ DEPUTY CLERK

(c) The Company has discriminatorily failed to promote black production and maintenance employees to supervisory and managerial positions.

(d) As individual, non-systemic, claims, the Company has discharged the plaintiff Swint in violation of Title VII or Section 1981 and has discharged (without giving back pay on reinstatement) the potential Intervenor Humphrey in violation of Section 1981.

The plaintiffs seek back pay or other monetary relief incident to the foregoing claims of discrimination; but such issue is severed for trial, if necessary, at a subsequent date. The plaintiffs, in view of proposals made by the defendants in conference, do not intend to challenge the practice by which daily assignments and vacancies have not been publicly posted; but reserve the right to present such an issue at trial if the conference proposals by the defendants prove to be unsatisfactory.

The defendants deny the several charges of discrimination set out above and in addition assert defenses in part based upon applicable statutes of limitation and the effect of arbitration awards.

5. Discovery. The parties are given leave to proceed with further discovery provided the same be completed at least ten days prior to trial. The parties shall at least ten days prior to trial exchange a list of witnesses and documents which they anticipate utilizing at trial.

Done this the 4th day of June, 1974.

United States District Judge

APPENDIX B

APPENDIX B

THE SENIORITY SYSTEM IN EFFECT AT PULLMAN-STANDARD

INTRODUCTION

The seniority system at Pullman involves the Company and two bargaining units - one represented by the IAM and the other represented by the USW. The system at Pullman-Standard was part and parcel of the racial discrimination practiced at the Bessemer plant; it was negotiated, adopted and maintained with an intent to discriminate.

At the time Pullman-Standard was organized in 1941, considerations of race permeated the manner by which the two bargaining units were set up. With the active cooperation of the USW and the agreement of the company, the IAM sought and achieved an all-white bargaining unit. The efforts of the parties to the collective bargaining process resulted in substantially increasing the number of one-race departments that had existed at the plant prior to unionization. With the negotiation of the "no-transfer" rule, the IAM was able to maintain its all-white status, with blacks being concentrated in the USW bargaining unit.

The departments in the USW bargaining units were thereafter manipulated so that even the potential for blacks to move into better jobs in a given department was removed, these manipulations occurring significantly enough, on the eve of changes in the seniority criteria. The evidence in the record demonstrates that when the seniority criterion was broadened, i.e. "departmental," departments were less racially mixed, due to the creation of one-race departments, and therefore less likely to offer even potential opportunities for blacks to exercise seniority rights vis-a-vis whites in higher paying jobs or whites with less seniority. Similarly, when the seniority criterion was narrowed, i.e., "occupational" (1947-54), departments were likely to be more racially mixed, the limitation of opportunities for blacks to exercise seniority rights in better jobs was a fait accompli since an employee held seniority only within the occupation in which he worked. It is clear, then, that the structure of the operational departments was manipulated along racial lines, depending on how broad or restrictive the seniority criterion.

The seniority system in effect at Pullman-Standard's Bessemer plant may be viewed as having three distinct phases: the 1941-42 initial organ-

ization of the company and negotiation of the system; the 1944-54 changes in the system and departmental structure; and the 1954 return to departmental seniority. The discussion that follows details the actions taken by the parties to the collective bargaining process during each of those time periods.

1941-42: UNIONIZATION AND GENESIS OF THE SENIORITY SYSTEM

Pullman commenced operations in Bessemer, Alabama in 1929. At that time, and for the next 12 years, there were no recognized unions at Pullman. Prior to unionization, the company was divided into 20 departments: 5 one-race departments (4 of which were all-white)[1/] and 15 were

---

1/ These figures, based on the record, stand in stark contrast to those set forth by the Steelworkers, see, e.g, USW Pet. 7 n.2. The Steelworkers' analysis of departmental changes during the period from 1941-1954 (USW Pet. 6-8), rests in large part upon a chart created by the district court for the purpose of describing the departmental structure in 1965. The 1965 chart, earlier criticized for other reasons by the Fifth Circuit (A 55-58), just cannot explain departmental changes which occurred over the preceeding 20 years and reliance on that chart results in numerous errors in the Steelworkers' analysis.

racially racially mixed.[2/] PX 1, 109.

The NLRB certification and subsequent "clarification"

In 1941, the IBEW, IAM, and USW, all of which had filed representation petitions, jointly participated in a representational hearing. PX 13 A151, 178.

The IAM, while claiming to represent a unit consisting only of machinists and their helpers and apprentices at Pullman, in fact sought recognition on behalf of employees in occupations which cannot properly be regarded as "machinist" occupations, e.g., cranemen, welders, wheel

---

2/ The four all-white departments were: Lumber Yard, Welding, Template, and Plant Protection (job of "Janitor", not included in this department but in racially mixed "Superintendent" Department). The all-black department was the Truck Department. A-150 n.12; PX 109. The racially mixed departments included the following: Die and Tool, Forge, Maintenance, Paint, Press,Punch and Shear, Shipping Track, Steel Construction, Steel Erection, Steel Miscellaneous, Stores, Superintendent, Wheel and Axle, Wood Erection, and Wood Mill.

fitters, tool grinders, axle-finishers, and pipefitters. Moreover, the IAM did not seek to include in their unit machinist-related occupations (e.g., machine operators, punch and shear operators) in racially mixed departments. PX 13, 14, 112. In its petition to the NLRB the IAM sought to exclude blacks from its bargaining unit.3/

3/ For example, the IAM petitioned for inclusion of the job of handyman in the racially mixed Die and Tool department, where it was staffed by whites, but not in the racially mixed Maintenance Department where it was staffed by blacks; petitioned for inclusion of crane operators in the Die and Tool Department and racially mixed Wheel and Axle department, where the job was staffed by whites, but not in the racially mixed Steel Miscellaneous department where it was staffed by blacks; and petitioned for machine operator jobs in departments where the job was staffed by whites, but not in departments where it was staffed by blacks. PX 1, 13, 109. Moreover, in the racially mixed Die and Tool Department, the IAM sought recognition on behalf of every single production and maintenance job except those occupied by blacks. Id.

On November 19, 1941 the Board certified[4/] the IAM as the bargaining agent for a particular group of workers in the Die and Tool department, Welders, Wheel and Axle, and Truck departments, and Air Brake department; and USW Local 1466 as the collective bargaining agent for all other production and maintenance employees of the Company. PX 14, 15. However, as a result of the NLRB November 1941 certification of the IAM unit, several jobs staffed by blacks were included within the jurisdiction of the IAM. For example, the November certification of the IAM unit included the all-black Truck department, and the all-white Wheel and Axle departments, because the evidence demonstrated that these departments performed a coordinated function and were operationally treated as one department. PX 13, pp. 29-30, 89, 144-48.[5/]

4/ The IBEW was certified to represent electrical workers and powerhouse operators. PX 15.

5/ Also included in the IAM unit at the time of initial certification in November 1941 were jobs staffed by blacks in the racially mixed Die and Tool departments and the racially mixed Wheel and Axle Department. PX 15, 109.

However, the racial integration of the IAM unit was "corrected," and a "clarification" made, by a letter agreement, dated December 19, 1941, reached by the IAM, the Steelworkers and the company.[6/] A 151 n. 13 By this agreement between the parties, entered into immediately after NLRB certification, the all-black Truck Department and all other jobs staffed by blacks, certified by the NLRB to be in the IAM unit, were given to the USW. As a further provision of the agreement the USW ceded to the IAM the jobs held by two white employees which had been certified in its bargaining unit.[7/] (Compare PX 1, 15, 17 pp. 14-16, 109, CX 14.)

6/ The agreement provides that the NLRB's decision "is ... in minor respects inadvertent in the classification of employees as has been recognized both by the company and by the respective bargaining agencies."PX 17, pp. 14-16.

7/ In total, the IAM swapped 24 black employees for 2 whites from the USW. The IAM gave up no whites. PX 1, 15, 17, 109.

In short, the IAM gave its black members to the USW and the USW, in turn, gave two of its white members to the IAM, with the acquiescence of the company and of the Board, thereby maintaining the all-white[8/] nature of the IAM despite the NLRB certification.

The increase in the number of one-race departments after unionization

Efforts to exclude blacks from the IAM unit and the subsequent swapping of jobs between the bargaining units (USW and IAM) in December of 1941 resulted in doubling the number of one-race departments which existed prior to unionization.

8/ The evidence in this record flatly contradicts the company's contention that blacks were included in the IAM at the time of unionization in 1941-42. Co. Pet. 12. In support of this contention, the company makes reference to the welder-helper job, a job in the IAM unit. This record shows 3 blacks in the position of welder helper in 1944. PX 2, 63. There were no blacks in the job when the company was organized and the seniority system was adopted. PX 1, 13, 15, 17, 109. The uncontroverted evidence is that the IAM unit was an all-white unit upon unionization of the company, and subsequent clarification, in 1941-42. PX 1, 17, 109.

As a result of unionization and the subsequent inter-union agreement, see p. 7, supra, five additional one-race departments were created.[9/] In addition to dividing racially the Die and Tool department leaving the all-black remnant in the USW, as well as carving out an an all-white segment from the racially mixed Maintenance department, the IAM and USW also converted a racially mixed department, Wheel and Axle, into a one-race all-white department, by their December 1941 agreement or "clarification."[10/]

9/ The five departments were as follows: (i) The all-black Die and Tool (CIO) department represented by the Steelworkers; the all-white IAM departments, including (ii) Die and Tool (IAM), (iii) Maintenance (IAM), (iv) Wheel and Axle, and (v) Air Brake. PX 1, 13, 17, 109.

10/ Prior to unionization and even after the initial NLRB certification in November 1941, PX 15, the Wheel and Axle department had been racially mixed. PX 109. However, the inter-union agreement caused the Wheel and Axle department to become an all-white department within the IAM unit. PX 1, 13, 15, 17, 109.

1944-54: THE MAINTENANCE OF A DISCRIMINATORY SENIORITY SYSTEM

The 1944-46 manipulations

In 1944 the IAM ceded to the USW the departments in its bargaining unit, with the exception of the all-white Die and Tool (IAM) and all-white Maintenance (IAM), two departments which have remained in the IAM since unionization. The all-white Wheel and Axle[11/] all-white Air Brake Pipe[12/] and the recently racially mixed Welding

---

11/ Although racially mixed prior to unionization, the Wheel and Axle department continued to be all-white upon its return to the USW unit. PX 2, 15, 17, 109.

12/ The history of the all-white Air Brake department is instructive when looking at this particular department system. Prior to unionization the three jobs which comprised this department were located in two racially mixed departments. PX 13, p. 85; PX. 17, pp. 14-15. In 1941, these jobs were assigned to the IAM where they formed an all-white department. Then in 1944, the department was transferred back to the Steelworker unit, PX 19, pp. 23-24, disbanded, and its jobs, pipefitter and pipefitter helper, were placed in the racially mixed Steel Erection department where they remained during the period when occupational seniority was used. Finally, in 1954, when departmental seniority returned to Pullman, the white-only Air Brake department was re-established. PX 9.

departments were ceded by the IAM to the USW in 1944.[13/]

An all-white Powerhouse department, which had been created and represented by IBEW at the organization of the company, was disbanded in 1946; those jobs were then placed in a racially mixed department represented by the USW, A 151, PX 2.[14/]

13/ Regarding the racial composition of the 1944 transfer of employees from the IAM to the USW unit, the USW states categorically "80 were white and 20 were black." USW Pet. 11, 18 n.11. This assertion is not supported by the evidence in this case which is that 3 blacks, not 20, were assigned to jobs in the IAM unit in 1944. PX 2, 63, CX 5. Apparently, the Steelworkers relied upon the company's brief in the Court below rather than the record for these statistics. The company admitted in the Court of Appeals that these statistics were based on mere speculation: "The inference might possibly be drawn that as many as 20 of the 100 lost were black ... although there is an element of conjecture in this ". Co. Brief at 21.

14/ During the occupational seniority system (1947-54), the all-white Powerhouse jobs remained in the racially mixed department. A new all-white Powerhouse department was created within the USW unit in 1954 upon the return to a departmental system.

The imposition of occupational seniority (1947-54)

During this seven-year period, there was an occupational seniority system in effect at Pullman. Under the occupational seniority system an employee could hold seniority in only one occupation, except that at the discretion of management an employee could be transferred and hold seniority in two occupations. PX 47, pp. 13-14 (1947 agreement). At this time, many of the one-race departments and the splinter departments created at unionization were re-merged[15/] into the racially mixed departments, represented by the USW, from which they had been separated at the time of unionization. During this period there was a decrease in the number of one-race departments, an increase in the number of racially mixed departments, and the configuration of the departments was broadened. Two all-white departments in the IAM and IBEW units, which were ceded to the USW in 1944 and 1946, respectively, were dis-

---

15/ /The all-White Powerhoue and Air Brake Pipe departments were merged into racially mixed departments during this time frame. PX 2-7.

banded; those jobs were then placed in the racially mixed departments where they had been prior to unionization. See, supra, p. 11, nn.12, 14.

The Return to departmental seniority and concomitant changes in departmental structure (1954 to trial)

A company-wide agreement was negotiated with the Steelworkers in August of 1954 which included all Pullman-Standard plants, and in 1956 for the first time the seniority was used for promotional purposes. A 131.[16/] As a result of the 1954 negotiations, Bessemer returned to the departmental seniority system.[17/] However, the system was not imposed upon the departmental configuration

---

16/ Previously, seniority, whether departmental or occupational, was used only for purposes of layoff and recall.

17/ Under the departmental system an employee who transfers from one department to another "shall relinquish seniority in the department from which he is transferred and shall start as a new employee in the department to which he is transferred...." See e.g., PX 35, p. 25 (1944 agreement) PX 34 (1954 agreement).

which obtained at the Bessemer plant during the period of occupational seniority (1947-54).

Instead, when the departmental seniority system returned to Pullman (1954-1972), again the racial composition of the departments within the USW unit was altered. More one race departments were created, including some one-job departments, were carved from racially mixed departments, In June 1954, two months prior to the negotiation of, and return to, the departmental system at Bessemer, five brand new, one-race departments were created within the USW unit.[18/] Compare PX 8 with PX 9.

---

18 / The Steelworkers misstate the facts regarding the establishment of these one-race departments. The Steelworkers assert that the departments were created during the period when occupational seniority was in effect and thus conclude that the creation of the departments did not harm the employment opportunities of the black workers. USW Pet. 8-10, 17 n.9. In fact, these departments were created just prior to the shift to departmental seniority. PX 8, 9.

The increase in one-race departments

The five one-race departments[19/] included the establishment of one all-black department, Janitors, and four all white departments: Plant Protection, (see Brief, n.21), Boiler House, Power House, and the Air Brake Department. See nn.12, 14, supra; PX 8, 9. The 1954 seniority system at the Bessemer plant remained "virtually unchanged throughout the next eighteen years of collective bargaining." A 131, 158.[20/]

19/ In 1954 another department, Railroad, was created which, except for the highest paying job, was all-black, PX 8, 9.

20/ In 1972 under the direction of the Labor Department an alteration in the system was made to allow a limited opportunity for some of the black employees to promote to formerly white-only jobs without forfeiting their seniority. See A 131-32, 159.

Office-Supreme Court, U.S.
FILED
APR 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

REPLY BRIEF FOR PETITIONER

SAMUEL H. BURR
C. V. STELZENMULLER
1600 Bank for Savings Building
Birmingham, Alabama 35203

F. B. SNYDER
200 South Michigan Avenue
Chicago, Illinois 60604
Attorneys for Petitioner
Pullman-Standard

THOMAS, TALIAFERRO, FORMAN, BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
Of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

No. 80-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

REPLY BRIEF FOR PETITIONER

INTRODUCTION

The reply brief for petitioners (Steelworkers) in the companion case, No. 80-1193, impressively demonstrates the Fifth Circuit's failure in this litigation to apply the "clearly erroneous" standard required by Federal Rule of Civil Procedure 52(a) in its wholesale rewriting of the trial court's findings of fact. One hopes that the true, really relevant facts, as found by the trial court and as substantially restated in our petition herein and that in No. 80-1193 may thereby escape the memory hole[1] to which the Fifth Circuit's latest opinion in effect consigns them.

---

[1] George Orwell, "1984" (1949 Ed., pp. 38-42)

We became aware of the Court's conference schedule applicable to these companion petitions only upon receipt of the Steelworkers' reply brief, and as we now understand, both petitions will be taken up at the Court's April 17 conference. In order to permit the consideration of this reply brief at this conference, this reply brief is being submitted in typewritten form. It will be resubmitted in printed form as soon as possible.

Respondent's brief in opposition (p. 7, n.8) makes the comment, "The company does not even assert that the case presents a conflict of decisions." While our petition is primarily addressed to the conflict of the Fifth Circuit's decision with *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977), as demonstrated in the Steelworkers' petition, it is certainly true, that there is a conflict among the circuits "on the issue whether a court of appeals may 'independently determine' the existence of discriminatory purpose free from the requirements of Rule 52(a)". Both petitions should be granted in order that his conflict be resolved. The purpose of this reply brief is to point out a further serious conflict among the circuits, namely as to the defense or principle of "business necessity", which is vividly shown by a comparison of the Fifth Circuit's decision in this case, with that of the Sixth Circuit in *Chrisner* v. *Complete Auto Transit, Inc.,* ____ F.2d ____, 25 FEP Cases 484 (March 19, 1981). The subject was dealt with on pages 6-7 and 28-30, particularly footnote 29, of our petition, but until the *Chrisner* case was decided the conflict among the circuits was not so manifest. We would like the Court to consider this conflict as an additional ground for granting our petition.

"Business necessity" crops up repeatedly in the Fifth Circuit's two opinions in relation to each substantive matter considered, viz. analysis of work force and labor market statistics (A-57, A-66) as bearing on seniority system *bona fides,* assignment of new hires to departments (A-69), and promotions to foreman (A-81-82; A-173-175); its 1976 decision said that welding and maintenance skills were not to be considered in

work force statistical analysis unless there was a certain "kind of business necessity finding" (A-57); literacy was not to be considered in analyzing foreman statistics unless Pullman adopted a minimum educational requirement and either "validated" it statiscally or proved it was a "business necessity" (A-81-82). The proceedings after remand to the District Court were hamstrung by these peculiar restrictions in the Fifth Circuit's mandate (e.g., see A-121, n.13) particularly as other of its holdings had defined "business necessity" as meaning absolutely essential or indispensable to safety and efficiency. Nevertheless, the District Court did find departmental incumbency was a business necessity[2] for purposes of its statistical analysis of temporary foreman promotions (A-113), but in its 1980 decision (A-153) the Fifth Circuit reversed this finding, treating departmental incumbency as if it were a restriction imposed by Pullman on temporary foreman vacancies; it said the "business need" for this was not "sufficiently compelling" and that to constitute "business necessity" it must "not only foster safety and efficiency, but must be essential to that goal ... and there must not be an acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' " (A-175). This was coupled with the Fifth Circuit's 1976 holding (A-57) that "The question of absence of qualifications is relevant, but only *after* the determination that a pattern of discrimination has been shown; and then, the burden is on the defendant to show absence of qualifications." And (A-69) that relative lack of qualifications is statistically immaterial, for failure to fill vacancies with blacks "would only be justified if the defendant [sic] could show ... they lacked minimum qualifications and if such qualifications were justified by a business necessity."

---

[2] It would have been better semantics to have said "it was a factor implying better qualification, other things being equal, but the District Court was constrained by the mandate of the Fifth Circuit (A-57) to use the terminology, "business necessity".

Now the Sixth Circuit has taken a dramatically opposed position as to business necessity and most of these related matters. The Sixth Circuit's position is the one we adovcated on pp. 29-30 of our petition, and we believe it is implicit logically in this Court's Title VII decisions. *Chrisner* v. *Complete Auto Transit, Inc.*, ____ F.2d ____, 25 FEP Cases 484 (6th Cir., March 19, 1981).

> "Literally construed, it would not be unreasonable to conclude that proof of a 'business necessity' defense requires a showing that the practice is absolutely necessary or inherently essential to the operation of the business.' Such a standard, however, would direct unwarranted strict scrutiny at the defendant's asserted justifications and has not been adopted by the Supreme Court. The proper test, as we see it, is the 'manifest relationship' test enunciated in *Griggs* [401 U.S. 424 (1971)] and its progeny which looks to whether the discriminatory employment practice is necessary to safe and efficient job performance. *Dothard*, [433 U.S. 321] at 332 n.14. For a practice to be 'necessary' however, it need not be the *sine qua non* of job performance; indispensability is not the touchstone. Rather the practice must substantially promote the proficient operation of the business.
>
> * * *
>
> "' For example, in requiring that there exist more than a business purpose for adhering to a practice, courts have demanded the presence of an overriding and compelling business purpose. *Kirby* v. *Colony Furn. Co.*, 613 F.2d 696 (8th Cir. 1980) ('The proper standard is ... whether there is a *compelling* need for the employer to maintain that practice and whether the employer can prove that is *no* alternative to the challenged practice.'); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978).

Head v. *Timken Rollerbearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973). *Campbell* v. *Ramsey*, 484 F.Supp. 190, 194 (E.D. Ark. 1980). The genesis of this approach appears to be *Robinson* v. *Lorillard Co.*, 444 F.2d 791, 798 (4th Cir.,), *cert. denied* 404 U.S. 1006 (1971).

"The dissent argues that the force of *Sweeney, supra,* necessitates a remand because the district court did not make the requisite findings on the business necessity defense when it condensed the Title VII analysis into two step. Nevertheless, it proceeds to assert that under *Head* v. *Timken Roller Bearing, supra,* the employer has not established a business necessity defense because the company subsequently used alternative selection devices. The dissent concedes the flaw in its analysis by ignoring the full force of *Sweeney*. Decided by the Supreme Court five years after *Head, Sweeney* stands for the proposition that the three-part Title VII analysis cannot properly be conducted in only two stages. The dissent's approach, which compels an employer to prove a business necessity defense by showing that there exist no less discriminatory alternatives, is, in essence, a two-stage analysis since it renders the third step superfluous. If an employer does prove a business necessity defense, that is, there are no alternative policies with a lesser discriminatory impact, a plaintiff would thereby be precluded from attempting to show that there are available alternatives — the crucial third stage of Title VII analysis. *Griggs* does not countenance denying a plaintiff the opportunity to rebut a business necessity defense under any circumstances, but that is precisely the result invited by the dissent's approach. An equally unsatisfactory result accrues when the other possibility is considered. If an employer does not prove the

absence of alternative policies, that would be the equivalent of affirmatively establishing that there are, in fact, viable alternatives. The burden of establishing the presence of available alternatives, however, belongs only to the plaintiff and must be sustained in the third stage of the analysis. Such an erroneous allocation of the burden of proof is exactly the practice rejected by *Sweeney*.

"This illustrates the dilemma the dissent puts itself in by arguing that a remand is necessary under *Sweeney* because the trial court collapsed the three step inquiry into two steps, and at the same time relying on *Head* v. *Timken Roller Bearing* which commands a two-step analysis. The dissent omits the full language of *Head*, which reads:

> "The court's error arose from its failure to take into account one necessary element of the test. *The test consists of two discrete parts* as set forth in *Robinson* v. *Lorillard Co.*, 444 F.2d at 798:
>
> "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and *there must be available no acceptable alternative policies or practices* which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (Emphasis in text.)

"Insofar as any two-part test is inconsistent with the three-part analysis outlined in *Griggs* and *McDonnell Douglas* and reinforced by *Sweeney*, it must be discarded.

"The dissent's insistence that *Head* has been 'consistently followed' cannot withstand the scrutiny of closer analysis. In *Horace* v. *City of Pontiac, supra*, this court did not cite *Head*, but rather quoted the three part test of *Griggs* and *McDonnell Douglas*. The only reference to *Head* appears in a block quote of the district court's opinion. 624 F.2d at 768. In *Mitchell* v. *Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *Head* was cited only for the proposition that females must have equal employment opportunities. 583 F.2d 281. In *EEOC* v. *New York Times Broadcasting Service, Inc.*, 542 F.2d 356 (6th Cir. 1976), *Head's* two-step process was, in fact, followed. 542 F.2d at 361. That was not true, however, in *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), where the court relied on *Head* solely for the principle that when a seniority system lock a minority of black employees into low opportunity areas of work, while protecting the status of those of the majority, it must give way. 515 F.2d at 313. And in *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1965), the court divided *Head's* second step into three subparts, holding that the essential finding was that the seniority practice at issue was not of compelling importance to the company's business, that whether the practice effectively carried out a business purpose was irrelevant because the challenge was directed at a facially neutral policy, and that the availability of alternatives was pertinent only to the remedy, not to liability. 513 F.2d at 1044. This 'long line of subsequent decisions' hardly constitutes a litany of faithful adherence to *Head* as suggested by the dissent. [Footnote in the original.]

"Complete Auto argues that its experience/schooling criteria were reasonable minimum requires to insure that yard employees were qualified to operate tractor trailers on the public highways in a safe and efficient manner. The yard employees are called upon to drive tractor-trailers to the overflow lot over the public highways. The performance of this task in a satisfactory manner requires a certain degree of skill in operating the tractor-trailers. The company's goal of transporting its freight in a safe and efficient manner is significantly served by hiring experienced truck operators. An individual who possesses experience in driving large, unwieldy vehicles is obviously a more rational choice for the job than is a person who does not have demonstrated ability to drive such vehicles. In this respect, the experience requirement accurately reflects the capacity of an applicant to do the job for which he is applying. Three is some risk to the public safety, as well as to the driver and truck, in the employment of an unqualified yard employee. The important public interest in safety on the roads and highways, *see Mackey* v. *Montrym*, 443 U.S. 1, 18 (1979); *Dickson* v. *Love*, 431 U.S. 105, 114 (1977), is sufficiently weighty to convince us that Complete Auto's experience requirement for yard employees is manifestly related to the safe and efficient operation of its business of transporting automobiles over the public highways.

> "Once the defendant in a Title VII disparate impact case has rebutted the plaintiff's prima facie case by proving a business necessity defense to to the challenged practice, the burden shifts back to the plaintiff. To establish liability at this point, the plaintiff must demonstrate that there is an alternative selection device with a disparate impact less than that of the challenged practice which would still serve the employer's legitimate interests in efficiency and trustworthy workmanship. *Griggs, supra,* at 432;

> *Albermarle, supra,* at 425. Because the district court failed to consider this as a separate stage in the analytical framework of the case, we remand the case for the court to conduct a hearing on this issue. In determining whether the plaintiff has sustained her burden in proving the existence of a viable alternative hiring procedure, the court should consider evidence that the plaintff might introduce on a variety of factors. Certainly any subsequent practices adopted by the company would be relevant. The hiring policies of comparable businesses might also shed some light on what constitutes a feasible alternative. Of course, the marginal cost of another hiring policy and its implications for public safety are factors which should not be omitted from consideration. In any event, the initial determination must rest with the trial court."

It is manifest that application of the Sixth Circuit's rule to the facts of this case would necessitate an entirely different result. Statistical analysis of hiring of machinists and millwrights would require comparison of numbers hired with numbers of experienced or trained machinists and millwrights in the labor market. The trier of fact could certainly conclude that literacy of foremen promotes efficiency even if it is not absolutely indispensable in every case. Statistical analysis of foreman promotion would obviously have to be vastly changed on the evidence in this case, from that which the Fifth Circuit made, based on its erroneous view of business necessity.

See also analysis of the *Chrisner* case in BNA Labor Relations Reporter, 106 Analysis 53 (April 6, 1981), wherein it is said, "This case illustrates the confusion that surrounds the business necessity defense. ..."

The writ should be granted to resolve this confusion and the conflict among the Circuits in this regard.

Respectfully submitted,

Samuel H. Burr

C. V. Stelzenmuller
1600 Bank for Savings Building
Birmingham, Alabama 35203

F. B. Snyder
200 South Michigan Avenue
Chicago, Illinois 60604

Attorneys for Petitioner

THOMAS, TALIAFERRO, FORMAN, BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203

Of Counsel

Certificate Of Service

I hereby certify that I have this 13th day of April, 1981 served two copies of the foregoing Reply Brief for Petitioner by United States mail, postage prepaid and properly addressed upon the following:

Barry Goldstein, Esq.,
806 - 15th Street, N.E.,
Washington, D.C. 20006;

Oscar W. Adams, III, Esq.,
1600 - 2121 Building,
Birmingham, Alabama 35203.

Michael H. Gottesman, Esq.
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Jerome A. Cooper
Cooper, Mitch & Crawford
409 N. 21st Street, Suite 201
Birmingham, Alabama 35203

C. V. Stelzenmuller
Of Counsel

Office-Supreme Court, U.S.
FILED
JUL 18 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1190, 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated, UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioners,*

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONER, PULLMAN-STANDARD

SAMUEL H. BURR
Counsel of Record

C. V. STELZENMULLER
D. FRANK DAVIS
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203
(205) 251-3000

F. B. SNYDER
200 South Michigan Avenue
Chicago, Illinois 60604

Attorney for Petitioner
Pullman-Standard

Of Counsel:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below applied wrong legal criteria in determining the bona fides of the seniority system.

2. Whether a federal court of appeals is bound by the "clearly erroneous" rule of F.R.Civ.P. 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of the consolidated cases in this Court contains the names of all such parties except for International Association of Machinists and Aerospace Workers, AFL-CIO and its Local 372 which were also parties for limited purposes in the court below.[1]

---

[1] References to the Joint Appendix will be made by the use of the letter "JA" followed by page number. To conform page references herein to those in the USW brief on the merits, we will make references to the Appendix to Petition for Writ of Certiorari in No. 80-*1193* by abbreviation "Pet.App." followed by page number. The employer will frequently be referred to simply as "Pullman". The United Steelworkers of America will be referred to by the initials "USW". For simplicity, the abbreviation "USW" may also refer to the predecessor of the United Steelworkers which was known as Steel Workers Organizing Committee. Where reference is desired specifically to the Steelworkers Local Union, it will be designated "USW Local 1466". In similar fashion Association of Machinists and Aerospace Workers will be referred to as "IAM" and its Pullman Local as "IAM Local 372".

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 14

ARGUMENT 15

I. The Bona Fides Of A Facially Neutral Set Of Seniority Rules Ultimately Turns Upon Whether Racial Discrimination Motivated Their Negotiation And Maintenance 15

II. Purpose And Motive Being States Of Mind, They Cannot Be Attributes Of A Set Of Seniority Rules As Such, But Must Be Ascertained As Mental States Of The Decision Makers Who Created Them 18

III. The Fifth Circuit's Rationale For Finding, Contrary To The District Court, That The Seniority System Was Not Bona Fide, Was Contrary To The Decisions Of This Court 27

IV. The Fifth Circuit Disregarded F.R.Civ.P. Rule 52(a) By Setting Aside Findings Of The District Court Which Were Not Clearly Erroneous 32

CONCLUSION 45

TABLE OF AUTHORITIES

CASES: PAGE

California Brewers Ass'n v. *Bryant*, 444 U.S. 598 (1980) 17, 22, 25-26, 34, 40

Carey v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974) 21

City of Mobile v. *Bolden*, 446 U.S. 55 (1980) 25, 26, 30 31,33

Dickerson v. *U.S. Steel Corp.*, 439 F.Supp. 55 (E.D. Pa. 1977), vacated and remanded on other grounds sub-nom 28

Douds v. *Int'l. Long Shoremen's Ass'n.*, 241 F.2d 278 (2d Cir. 1947) 38

Edmonds v. *Southern Pacific Transportation Co.*, 19 FEP Cases 1052 (N.D. Cal. 1979) 28

Franks v. *Bowman Transportation Co.*, 424 U.S. 758 ... 37

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 16

Harris v. *Anaconda Aluminum Co.*, 479 F.Supp. 11 (N.D. Ga. 1979) 28

James v. *Stockham Valves & Fittings Co.*, [559 F.2d 310 (5th Cir. 1977)] (cert. denied 434 U.S. 1034) 15, 17 20, 34

Milliken v. *Bradley*, 418 U.S. 717, n.24 (1974) 24, 25, 26 27, 34

Myers v. *Gilman Paper Co.*, [554 F.2d 837, cert. dismissed 434 U.S. 801] 21

Palsgraf v. *Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 ALR 1253 (1928) 17

Personnel Administration of Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 18, 28

Rostker v. *Goldberg*, _____ U.S. _____, 49 LW 4798 (June 25, 1981) 18

Sledge v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied* 440 U.S. 981 (1979) 28

Swann v. *Board of Education*, 402 U.S. 1 (1971) 26

Swint v. *Pullman-Standard*, 624 F.2d 532-33 20

Table of Authorities Continued

PAGE

Teamsters v. *United States*, 431 U.S. 324 (1977) .. 14, 15, 16, 17, 18, 21, 25, 27, 29, 31, 32, 34, 38, 39

Terrell v. *U.S. Pipe & Foundry Co.*, _____ F.2d _____ 25 FEP Cases 1262 (1981) 21

United Jewish Organizations v. *Carey*, 430 U.S. 144 18

U.S. v. *Georgia Power Co.*, 634 F.2d 525 (1980) 20

U.S. v. *Morgan*, 581 F.2d 933 (D.C. Cir. 1978) 34

Winfield v. *St. Joe Paper Co.*, 20 FEP Cases 1103 (N.D. Fla. 1979) 28, 30

Worthy v. *Dickinson*, 616 F.2d 698 (3d Cir. 19980) 28

Younger v. *Glamorgan Pipe & Foundry Co.*, 20 FEP Cases 766 (W.D. Va. 1979), *aff'd*, 621 F.2d 96 (4th Cir. 1980) (per curiam) 28

Zimmer v. *McKeithan* 485 F.2d 1287..... 31

STATUTES:

Labor-Management Relations Act, 29 U.S.C. §159(a,b) .. 14, 22, 36, 38

Title VII, §§703, 706, 42 U.S.C. §2000 e 2

Title VII, §706, 42 U.S.C. §1981 2

Wagner Act §10(e)..... 22

NLRB DECISIONS:

Local 323, IBEW (Hoff Electric Co.), 242 NLRB 305 (1979)..... 38

Pullman-Standard Car Mfg. Co., 49 NLRB 542 (1943) .. 13

Pullman-Standard Car Mfg. Co., 61 NLRB 1398 (1945) . 13

Pullman-Standard Car Mfg. Co., Pullman Car Works Plant, NLRB 13-RC-2639 (August 13, 1952) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1190, 80-1193

PULLMAN-STANDARD, a Division of Pullman, Incorporated, UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioners,*

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONER, PULLMAN-STANDARD

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinions and judgments of the courts below are reported as follows: (1) Opinion of the United States District Court for the Northern District of Alabama on September 13, 1974, reported at 11 FEP Cases 943 and 8 EPD ¶ 9720 (Pet.App.117a); (2) Opinion of the United States Court of Appeals for the Fifth Circuit on August 30, 1976, reported at 539 F.2d 77, 13 FEP Cases 604, and 12 EPD ¶ 11,177 (Pet. App.67a); (3) Opinion of said District Court on July 5, 1977, reported at 15 FEP Cases 144 and 14 EPD ¶ 7815 (Pet.App. 45a); (4) Opinion of said District Court on October 11, 1977, reported at 15 FEP Cases 1638 and 15 EPD ¶ 7995 (Pet.App.48a); (5) Opinion of said District Court on May 5, 1978, reported at 17 FEP Cases 830 and 17 EPD ¶ 8604 (Pet.App.23a); (6) Opinion of said Court of Appeals on August 18, 1980, reported at 624 F.2d 525 and 23 FEP Cases 748 (Pet.App.1a).

JURISDICTION

The judgment sought to be reviewed was dated and entered on August 18, 1980. Pursuant to timely filed Petitions for Certiorari by Pullman-Standard, a Division of Pullman, Incorporated in No. 80-1190, and by United Steelworkers of America, AFL-CIO and Local 1466, United Steelworkers of America, AFL-CIO in No. 80-1193, the Court on April 20, 1981 granted both petitions for writs of certiorari limited to Question One presented by each petition. The order granting the writs of certiorari consolidated the two cases (49 L.W. 3788). Jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. §§2000e et seq., specifically Section 703 thereof (42 U.S.C. §2000e-2) and Section 706 thereof (42 U.S.C. §2000e-5). Additionally the Civil Rights Act of 1866, 42 U.S.C. §1981. Sections 703, 706 of Title VII and §1981 have been already set forth in the Appendix to the Petition for Certiorari in No. 80-1190 at pages A-180-191 and are therefore not reproduced herein.

STATEMENT OF THE CASE

The portions of the record which are material to the consideration of the questions presented may be summarized as follows: Jurisdiction in the district court was based on §706(f)(1) of Title VII and 42 U.S.C. §1981. The complaint, which was twice amended, at all times alleged with respect to the seniority system whose legality was challenged that all conditions of employment of the plaintiffs were governed and controlled by the collective bargaining agreements between USW and Pullman and that under and pursuant to such agreements a seniority system was established which was alleged to discriminate against black employees (JA 15-16, 20-21). The IAM was joined as a party defendant in the

amended and second amended complaints simply as a Rule 19(a) defendant F.R.Civ.P. Rule 19(a). The pleadings did not allege anything about a seniority system to which the IAM was a party. No damages were sought against the IAM. The IAM was not joined as a party until the commencement of the first trial (JA 31-32) and then only "for the limited purpose that a part of the relief sought by the plaintiffs may involve some modification to the collective bargaining agreement" with Pullman. IAM Local 372 was joined eight days after the first trial began, likewise, for the limited purpose of enabling the Court to modify its collective bargaining agreement if necessary (JA 32-41). The district court entered a pretrial order dated June 4, 1974 limiting the seniority issue to the system of departmental seniority established in the Pullman-USW contract. At all times since 1944 the seniority provisions in the Pullman-IAM Local 372 contracts have provided for seniroity based on length of service in job classifications (JA 177). Nothing in any pleading or pretrial order was ever addressed to that job classification or occupational seniority provision.

The Pullman plant at Bessemer, Alabama was built in 1929 and is engaged in manufacturing many types of railroad cars. Not only are there frequent and large fluctuations in the size of the work force at Bessemer (JA 37, 90), but also as each new car order goes into production there are large manpower fluctuations in the 27 departments which peak at quite different times (JA 37). The skills in the various USW departments, such as painting, welding, and assembling, are not readily interchanged. The historical facts underlying the Pullman-USW seniority system are as follows: On August 1, 1941, the USW filed a petition with the National Labor Relations Board seeking to represent a unit of all Pullman's production and maintenance employees. Thereafter, three unions intervened in this representation proceeding; IAM Local 359, IBEW Local B 287, and Federal Labor Union, AFL (JA 105, 106, 152, 158, 165). The IAM and IBEW sought craft units of skilled workers and apprentices and helpers coming within

their traditional craft jurisdictions. The Federal Labor Union sought a residual unit of all production and maintenance employees except those being sought by the IAM and IBEW.

On August 28, 1941 the NLRB conducted an extensive hearing to determine the appropriate unit or units for the purpose of collective bargaining at the Pullman plant. Throughout much of this hearing evidence was introduced concerning the skills of the employees sought to be represented by the two craft unions. Following the hearing the NLRB entered a decision and direction of elections (JA 150-60) in which it determined that the units sought by the craft unions were true craft units comprised of skilled workers, helpers and apprentices, with a community of interest as such craft workers. The Board also found that an overall production and maintenance unit would be appropriate as would also the residual type unit being sought by the Federal Labor Union. It ordered an election to be held among three voting groups such that if the USW won all the elections it would be certified for an overall unit but if the craft units won in their respective voting groups they would be certified for the respective craft units. The employees sought to be represented by the IBEW were the electricians and powerhouse workers, both of which in 1941 were for administrative and payroll purposes part of the maintenance department. The craft unit sought by the IAM also cut across existing departmental lines and included some employees in the existing maintenance department, namely the millwrights, some in the die and tool department, all in the welding department, all in the wheel and axle department except crane hookers, and some in the existing steel erection department, namely the air brake pipe men, and tool room employees. As a result of the election, the Board certified the IBEW for the electricians and powerhouse employees; the IAM for the employees sought by it, inadvertently including, however, the employees of the truck department (JA 120, 136, 137, 149, 170, 171); and the USW for all the remaining production and maintenance employees plus the guards.

The source of the inadvertent inclusion in the IAM unit of the non-craft truck department was testimony at the Board hearing that the wheel and axle and truck departments were treated as one on the payroll (JA 131), and used a common crane (JA 138), and their work was in the same area and closely coordinated (JA 130). Some question was raised at the hearing by the USW as to whether the IAM sought to represent black employees. The evidence was uncontradicted that the IAM was willing and able to represent black employees falling within its craft jurisdiction (JA 145, 149). Following the certification, the IAM became aware that its certification covered unskilled truck department employees who were black. The IAM took the bargaining position that it would accept representation of the truck shop employees according to the certification but that it did not want to do this (JA 207). Pullman took no position as to the appropriateness as to any of the units sought in the NLRB proceeding (JA 110, 155). Following the decision and direction of election but before the election, the USW moved the Board to reconsider its unit determinations and alleged that the unit sought by the IAM covered diversified and unrelated employees scattered in small groups around the plant, with little common degree of skill. The Board denied this motion and certified the units as set out in the decision and direction of election, although the record shows the IAM never sought the truck employees (JA 137, 148). The IAM and USW took the inadvertent inclusion of the truck department employees to the Board which requested the unions to settle the matter by agreeing upon a correction of the inadvertent error. Thereupon the unions agreed upon a correction, the substance of which was to move the truck employees from the IAM unit to the USW bargaining unit. Pullman, after being repeatedly urged to do so by the Board (JA 293), accepted this arrangement, adding a notation "assuming that the foregoing is satisfactory to the Board, and subject to Board orders" (JA 170-71).

Thereafter bargaining commenced in December, 1941. At all times bargaining was separate with the IAM and the USW

and although Pullman sought a degree of flexibility in switching employees from one department to another, irrespective of seniority, the USW held out for straight departmental seniority. Eventually agreement was reached on a departmental seniority clause in the first USW contract dated April 7, 1942 (JA 180-82).

In 1944 there were a number of strikes in the plant. One of these strikes was by the IBEW. Pullman managed to replace all strikers, following which the USW petitioned to represent the electricians and powerhouse workers; the strike replacements voted for the USW and the IBEW was decertified by order of the Board, thereby merging its unit back into the USW unit. The electricians were immediately placed back into the maintenance department on the USW seniority list; however, the powerhouse employees were kept separate on the seniority list from 1944 to 1947, evidently because of the desire of employees once seniority groupings had been established to continue in the same status (JA 323).

The other strikes in 1944 were numerous and reflected dissatisfaction by the members of the IAM unit who were scattered among the production departments, namely the welders, air brake, tool room, and wheel and axle men, whereas the craft nucleus of machinists and other die and tool employees as well as the millwrights, remained loyal to the IAM. The strikes were in support of organizational efforts by the USW to represent some of the employees then represented by the IAM (JA 337). The record of one of these strikes in January, 1944 (JA 255), indicates that most of the strikers were USW unit employees. This record also shows that at that time there were four black employees in the IAM unit, two of whom struck and two of whom did not strike in the January, 1944 organizational strike. Later in 1944 the organizational efforts of the USW were more successful and it petitioned on May 25, 1944 for an election to take over the entire IAM bargaining unit (JA 294-297). The USW had evidently attained its majority by May, 1944 when it filed its petition and matters had progressed to the point that only the

millwrights and tool and die employees had crossed the latest organizational picket lines. The NLRB then ordered a hearing on the USW petition. At this meeting on June 14, 1944, the NLRB sought an amicable settlement of the matter. The USW spokesman Herring stated that the USW would agree to annex all of the IAM unit except for the die and tool employees and millwrights who had crossed their picket line as "they didn't want them scabbing son-o-bitches, they came across our picket line" (JA 338). The IAM, rather than submit the question to an election which might result in their losing the entire unit, agreed to this proposal which was then reduced to writing (JA 174-175). To this agreement of the union there was appended a paragraph over the signature of Pullman to the effect that it had taken no position in the selection of bargaining representatives by its employees, took no responsibility for this agreement but acquiesced in it in the interest of industrial peace, and would recognize the unions for their respective agreed on units, subject to any valid order or legal requirement to the contrary (JA 176).

It is clear from the record that there were at least four blacks in the IAM unit, two of whom at least were welder helpers, who were by virtue of this agreement moved out of the IAM bargaining unit and into the USW bargaining unit (JA 255). There was a total of approximately 100 employees moved out of the IAM unit and only some 50 who remained. (Co.Ex. 62, 63, 1978 trial).

In its 1942 and 1944 contracts, the IAM had agreed to departmental seniority. However, following the loss of two thirds of its bargaining unit, it amended its June 13, 1944 contract (JA 172) on October 6, 1944 (JA 177) so as to eliminate the three departments where it had no further representation rights and to change its system of seniority to length of service in each respective classification. From October 1944 on, the regime of occupational or job classification seniority has prevailed in the IAM bargaining unit.

In 1947 negotiations between USW and Pullman it was proposed by black union committeeman Gus Dickerson that the seniority system in the USW contract also be changed to occupational seniority (17 FEP Cases at 738, Pet.App.40a; JA 256, 274). This was agreed to and occupational seniority continued to be the rule until 1954.

When the IAM lost its employees in three departments in June, 1944, two of the departments, welding and wheel and axle, which had been separate departments at all times, remained intact as seniority units in the USW. The air brake pipe shop department, which was split off from steel erection in 1941 when the IAM was certified, was retained in June, 1944 as a separate seniority department and was not merged back into steel erection at that time. This may well have reflected the usual desire of employees not to alter seniority status once established (JA 323).

When the seniority regime was changed from departmental to occupational on the June 1, 1947 seniority list, many nominal departments were merged on the USW seniority list. However, since seniority now applied by occupation, in no case was there any merger of seniority units. Thus, in June, 1947, the powerhouse, formerly an IBEW department, was placed back under the heading of maintenance department, as was the railroad department. Air brake pipe shop was put back on the steel erection seniority list, along with the tool room. At the same time, the truck/tractor department was merged on the list into miscellaneous stores and crane service into steel stores. It is apparent that none of these paper changes merged any seniority groups which were now fragmented or divided down to the occupational level. Between 1947 and 1954 there were several other mergers of departments on the seniority list which likewise did not affect anybody's seniority. Thus, in 1951 the janitors and plant guards were placed in a single safety department, but they remained in separate seniority groups. The only significantly new department formed after 1942 was the inspection department. This was a small group of employees originally taken

from welding, steel erection, template and wood erection. They were tried out as a separate department for a year, then moved back on the seniority list into slightly different departments from whence they came. After a year of this they were again placed back into a separate department on the seniority list in 1950. Since then they have remained a separate department. In 1954 the USW successfully demanded that Pullman bargain in Chicago jointly for the Bessemer, Hammond, Indiana and Butler, Pennsylvania plants. In these negotiations the USW demanded that Bessemer be returned to departmental seniority which was already the arrangement at Butler and Hammond. Pullman agreed to do this in the 1954 contract but in preparing new seniority lists certain of the historical seniority groupings were kept intact by dividing certain departments manned by employees with different seniority standings and skills. The most important one of these according to the courts below was the separation of plant protection and janitors into separate departments, which did nothing to affect existing seniority rights but preserved them. In the same manner, the powerhouse department was reestablished out of the maintenance department, as was the historically separate railroad department. The boiler house was created then as a new department with about two or three employees, but this department had been entirely vacant since May, 1965 so that any practical significance it may have had was extinguished prior to the effective date of Title VII. The only other significant departmental change was the merger of two fairly large, both well integrated, departments into the paint and shipping track department. Since 1954 there were no changes in the seniority system except that in 1969 and 1972 Pullman entered into bilateral agreements, that is ones not entered into by either union, with the Department of Labor OFCC to confer certain preferential treatment on black employees. These preferences included transfer rights with full seniority out of four all black or substantially black departments into any other department in either bargining unit. In addition, all black employees hired before April, 1965 had transfer rights with full seniority into formerly all-white

departments in which they had the qualifications to work. The evidence showed without dispute that at all material times well over 90% of the black employees were in racially mixed departments and that the contractual departmental seniority rights have resulted in blacks having advanced rapidly to higher job classifications in each department, displacing white former incumbents of those jobs as layoffs and recalls occurred after 1965. It is apparent that if discrimination existed at the Bessemer plant it was in spite of and not because of the departmental seniority system which was a vehicle of upward mobility after 1964. After 1966 Pullman was clearly engaged in efforts to move whites into formerly predominately black departments and blacks into formerly predominately white departments (15 FEP Cases at 148; Pet.App. 53a).

The history and changes in departmental organization, union representation, and system of seniority are graphically summarized in the chart at JA 336.

Pullman presented a variety of statistical studies which indicate, along with other proof, that its seniority system and the OFCC Agreement have in fact not perpetuated any wrongs or retarded black progress but that blacks have rapidly advanced. The actual percentage of black employees at Bessemer is significantly higher than in the relevant labor market; random distribution therefrom would result in a work force about one-third black, while the observed frequency is around 50%. In the last year before the first trial for which such data was available, 1973, the mean annual earnings of black employees, including Unemployment and Supplemental Unemployment Benefits was 98.5% the average for all employees. Calculation of mean annual earnings for 1970 through 1973 showed the black percent of the mean was 94, 96, 96.1 and 98.1% respectively. It is clear that there has been a gradual and consistent improvement in the prosperity of black employees.[1] The District Judge's independent analysis

---

[1] The Fifth Circuit in the 1976 appeal held (539 F.2d at 97; Pet.App.99a-100a) that these statistics were *irrelevant* and that it was improper to consider them, because they did not reflect differences in seniority and time worked.

of the data showed that 40% of the blacks and only 36% of the whites were in the upper half of departments ranked according to departmental desirability.[3]

In analyzing the record evidence of industry practices, a distinction must be drawn between (1) departmental seniority accrual and administration; (2) the delineation of departments; and (3) the existence of separate bargaining units, actually not a part of the seniority system in question here at all. As for (1), the evidence was quite substantial and uncontradicted that departmental seniority was the model or generally prevailing practice in large industrial plants as well as in the transportation equipment industry in particular; that a majority of such plants had departmental or smaller seniority units (JA 325-27, 331; Co. Ex. 20, 1978 trial, USDL Bulletin on Major Collective Bargaining Agreements 1425-11, "Seniority in Promotion and Transfer Provisions" (1970)). It was also shown that the larger the plant and the more varied the requisite skills, the more prevalent it was for departmental or narrower (e.g., occupational) seniority units to be agreed to; that —

> "For purposes of efficiency and to minimize disruptions, most employers prefer to confine promotions . . . within smaller units and jobs calling for identical or closely related skills. . . ." Co. Ex. 20, *supra.*

It was shown that the seniority clause of a collective bargaining agreement is the "Union's clause"; that it confers no advantage on management, which can make decisions based on

[3] The Fifth Circuit's 1976 opinion held that "departmental desirability" was not relevant to whether there had been a racially discriminatory departmental seniority system (539 F.2d at 89, 93; Pet. App. 83a-84a, 89a-90a) except that it would be relevant to prove, but not to disprove discrimination. The opinion further said evidence of economic harm was irrelevant to the question of discrimination unless it favored plaintiffs' case, and also irrelevant to an award of back pay unless defendants first carried a burden of "convincingly [bringing] into question the class' entitlement to it." The Fifth Circuit's 1980 opinion again said (624 F.2d at 531; Pet.App. 10a) that although evidence of economic desirability cannot help the defendant, it may be considered to the extent it favors the plaintiffs.

pure self-interest within limitations of law, without any seniority clause; that a seniority clause is a union demand, not management's, and limitations on application of seniority, either by adoption of seniority units narrower than plant-wide, or by conditioning seniority application on relatively equal ability, are commonly regarded by management as necessary to efficiency. The balance usually struck, particularly where the plant is large and the skills are varied and not interchangeable, is to adopt seniority units less than plant-wide composed of employees having related skills (JA 321-24). Thus the evidence amply supported the District Court's finding of conformity to industrial practice (17 FEP Cases at 735, 737; Pet.App. 33a, 37a-38a) so far as the basic principle of departmental seniority is concerned. (2) As for the delineation or scope of the departments in the USW bargaining unit is concerned, the evidence showed they generally conformed to the practice in similar plants, with no more variation than those varied from each other (Butler, JA 206, 317-19; Hammond, JA 242; ACF, JA 329-30; Evans Products, JA 332-33; Greenville Steel Car, JA 334-35; Eastern Car, JA 305-12). The difference that Bessemer's IAM bargaining unit cuts across departmental lines falls in the third, not the second category of industrial practice, and actually is not part of the Pullman-USW seniority system at all. (3) As for the division into two separate bargaining units, the District Court found this conformed to industry and NLRB practice for the elementary reason that this was ordered by the NLRB, which had discretionary authority to make determinations of appropriateness of craft units, and power to make conclusive fact findings if supported by evidence (17 FEP Cases at 736; Pet.App.36a). The Fifth Circuit declared the existence of the IAM unit had no conceivable purpose but racial discrimination (624 F.2d at 531, 533, Pet.App.11a, 16a) and found the entire seniority system (erroneously conceived of as the sum of all seniority rules at the Bessemer plant) did not conform to industry or NLRB practice, because there was no craft unit at Butler or Hammond (624 F.2d at 531, 533; Pet.App. 11a, 16a). The

simplest answer to this is that the separate IAM unit was not even part of the USW seniority system, therefore could not make it fail to conform to industry practice; a second answer is that craft units exist in hundreds of industrial plants, as specifically contemplated by Congress, wherever the NLRB has done what happened here (found craft unit appropriate, majority voted for separate representation, NLRB certified union) but not in otherwise similar plants whose bargaining history differed in those respects, and simply for those historical reasons.[4] The Fifth Circuit closed its eyes to the fact

---

[4] The Bessemer USW unit excluded machinists and millwrights, but included plant guards. The inclusion of plant guards would be illegal in units certified after 1947. 29 USC §159(b). The Butler and Hammond USW units included machinists and millwrights but *excluded* guards (JA 199). The exclusion of machinists at Bessemer has no more significance to conformity to industry practice than the inclusion of guards at Bessemer and their exclusion at Butler. The reasons were historical (cf.footnote 23, *infra*). Furthermore, the Fifth Circuit erred in concluding Bessemer was unique in the "Pullman Family" (624 F.2d at 532, 533, JA 12a, 16a) in having a bargaining unit of fewer than all production and maintenance employees. The record shows (JA 200) the Pullman Car Works Passenger Car Plant at Chicago had a USW bargaining unit bargained for jointly with Butler, Bessemer, Worcester and Hammond in 1956. This bargaining unit included most production and maintenance employees but excluded the following craft categories: stationary engineers, production and maintenance electricians, metal polishers and buffers, and platers and helpers. It also excluded guards. The excluded craftsmen were in IBEW and Metal Polishers Union bargaining units. *Pullman-Standard Car Mfg. Co., Pullman Car Works Plant,* NLRB Case No. 13-RC-2639 (August 13, 1952). Also Pullman-Standard operated a shipyard in Chicago in 1943 where the NLRB certified the USW for a unit of production and maintenance employees, excluding tugboat crews among others. *Pullman-Standard Car Mfg. Co.*, 49 NLRB 542 (1943). Both Butler and Hammond have separate guard bargaining units. *Pullman-Standard Car Mfg. Co.*, 61 NLRB 1398 (1945). These examples expose the Fifth Circuit's basis for finding the USW bargaining unit at Bessemer not in conformity with industry practice, as totally false.

that bargaining units, like seniority systems (they are often coterminous) come in many sizes and shapes; and that this is a necessary consequence of the discretion and flexibility given the NLRB by 29 USC §159(b), and of the concern accorded to employee choice or preference in such matters by federal labor policy. Existence of separate units could in no meaningful sense make a seniority system fail to conform to industry practice where they were prescribed by the NLRB; industry must in general be presumed to be law-abiding. As pointed out by the District Court, the petitioners herein had no real choice but to contract for seniority rules to apply to employees within the unit certified by the NLRB (17 FEP Cases at 736; Pet.App. 36a). It is the *Gestalt* of the system (17 FEP Cases at 737; Pet.App. 37a) which must be looked to for judging conformity to industry practice rather than to its minutiae. The fact that over 90% of the employees were always in racially mixed departments must be considered in that process. The District Court was surely not clearly erroneous in finding that the Pullman-USW seniority system conformed to industry practice and applicable NLRB decisions.

SUMMARY OF THE ARGUMENT

The Court of Appeals applied incorrect legal criteria in determining the bona fides of the seniority system in question. The ultimate test of bona fides is whether racial discrimination motivated the negotiation or maintenance of the seniority system; but the Court of Appeals distorted the term "genesis" as used in *Teamsters* v. *United States*, 431 U.S. 324 (1977) to mean, not motive or purpose, but simply discrimination "in the air" or something akin to original sin. It thereby resurrected the pre-*Teamsters* test of bona fides as one of perpetuation of past discrimination, and held, contrary to *Teamsters*, the seniority system was not bona fide.

Purpose and motive are mental states of the decision-makers who negotiated the seniority system. At the plant in question there were two unions bargaining independently of

each other; their contracts had separate sets of seniority rules. A seniority system being a complex unity subject to a common plan or serving a common purpose, there were two separate seniority systems at this plant; but the Court of Appeals gratuitously assumed they were one unity and attributed the supposed motives of the IAM to the USW in determining the bona fides of a supposed plant-wide seniority "system", which is an incorrect legal standard under *Teamsters*. The Court of Appeals has fashioned from the recitation of particular circumstances in the *Teamsters* case, a four-part mechanical test of bona fides which it manipulates to reach the result it wants to reach, without regard to evidence of actual motive or purpose of the relevant bargainers.

It disregarded entirely the findings of fact of the District Court, carefully made after a lengthy trial, because it felt firmly convinced, not that any particular findings were wrong, but that the end result was unacceptable. It suggested that the District Court found the facts under an erroneous view of controlling legal principles, but did not identify any such erroneous view. In doing so the Court of Appeals acted contrary to F.R.Civ.P. Rule 52(a).

ARGUMENT

I. The Bona Fides Of A Facially Neutral Set Of Seniority Rules Ultimately Turns Upon Whether Racial Discrimination Motivated Their Negotiation And Maintenance.—

The District Court correctly applied,[5] the Court of Appeals paid mere lip service to,[6] the principle that *bona fides*

---

[5] "The factors extracted by *James* v. *Stockham Valves & Fittings Co.*, [55 F.2d 310 (5th Cir., 1977)], ultimately but aids, or focal points, for deciding 'whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system' . . . " (17 FEP Cases at 739, Pet. App. 43a)

[6] "In *Teamsters* v. *United States*, [431 U.S. 324 (1977)], the Supreme Court held that, absent a showing of discriminatory purpose in a seniority system, that system is protected by §703(h)." (424 F.2d at 530, Pet App. 8a).

ultimately has to do with state of mind, i.e., motive or purpose. Although *Teamsters*, 431 U.S. 324 (1977) neither defined *bona fides* as used in §703(h), nor said which party has the burden of proving bona fides or absence thereof, it is reasonably apparent from the opinion, as well as the language of §703(h) that discriminatory purpose having a causal relation to seniority rules is ultimately determinative of their bona fides. While certain conceivable rules in union contracts operating in conjunction or tandem with seniority rules, such as a requirement of a high school diploma for jobs, must be judged by the "disparate impact" approach of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) instead of the intention or purpose approach to seniority systems adopted in *Teamsters, California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 607 (1980) holds such rules are not to be considered part of the seniority system; therefore they continue to be subject to the disparate impact analysis irrespective of bona fides. Rules specifying the onset of seniority rights, rules describing the forfeiture of seniority rights, rules defining seniority accruals, and rules particularizing the employment conditions that will be governed by seniority, are ancillary parts of a seniority system, not to be judged by disparate impact, but under the aegis of bona fides, and to be judged on the basis of intention, purpose or motivation.

The enumerated circumstances in *Teamsters*, (431 U.S. at 355-56) preceding the conclusion that—

> "In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful",

are all fairly subsumed within the crucial test of discriminatory motivation, purpose or intention.[7] (a) The circumstance

---

[7] The Court also necessarily held that the additional fact that the system extends no retroactive seniority to post-Act discriminatees in assignments to jobs, likewise does not make it unlawful. For in *Teamsters* that circumstance was found to exist, but was held fully remediable by adjudging retroactive seniority to individual discriminatees without altering the seniority system.

that the seniority system in *Teamsters* applies equally to all races and "locks" members of one race in jobs no differently than similarly situated members of other races, is of course in this category; if the rules are overtly racially discriminatory, then it was certainly their purpose to discriminate. (b) The circumstance that the seniority system in *Teamsters* "is rational, in accord with industry practice, and consistent with National Labor Relations Board precedents" has significance only to the extent that it is more consistent with non-racial business motives than the opposite. *California Brewers Ass'n*, 444 U.S. 598, approved as bona fide a seniority rule which appears to be unique to that employer association and not shared by industry in general. (c) The circumstance that the seniority system "did not have its genesis in racial discrimination" is simply a restatement of motivation, purpose, or intention,[*] with particular reference to the time the seniority system came into existence.

---

[*] In a footnote to *Teamsters*, 431 U.S. at 346 n. 28, this Court explained that a seniority system may have its genesis in discrimination "if an intent to discriminate entered into its very adoption." So far as this Court's use of the term is concerned, genesis thus means nothing more than intention at the time of adoption. The District Court in this case called the word genesis ambiguous, saying it presumably included an element of "the extent of racially discriminatory practices at the time the seniority system came into existence" (17 FEP Cases at 737, Pet.App. 38a) without regard to any causal relation. The ambiguity, if any, was not the result of anything in this Court's opinions, but appears to have been suggested by the Fifth Circuit's opinion in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (1977), cert. denied 434 U.S. 1034, which, in discussing "genesis" lay heavy stress on the statement that when Stockham's seniority rules were adopted, "segregation in the South was standard operating procedure"; that their history was "clouded"; that Stockham had refused to change them in bargaining, that its plant had segregated facilities until 1974. The Fifth Circuit evidently interprets genesis as meaning, to paraphrase negligence law, "discrimination in the air." See *Palsgraf* v. *Long Island R. Co.*, 248 NY 339, 162 N.E. 99, 59 ALR 1253 (1928). In its decision here reviewed, the Fifth Circuit gave controlling effect

The Fifth Circuit first created ambiguity in the term genesis and then in a series of decisions of which the present one is typical, effectively eliminated motive or purpose of seniority rules as elements of genesis, so that nothing remains of genesis except discrimination "in the air". Since there was much more of that in *Teamsters* than there is in this case, the end result is a resurrection of the "perpetuation of pre-Act discrimination" rationale with even the perpetuation element left out. By this means the Fifth Circuit has changed "genesis" from a virtual synonym for motive into a "facile abstraction used to justify a result"[9], namely a return to the pre-*Teamsters* line of cases that had routinely struck down seniority systems on the basis of perpetuation of past discrimination, regardless of the presence or absence of discriminatory motive on the part of the decision-makers.

II. Purpose And Motive Being States Of Mind, They Cannot Be Attributes Of A Set Of Seniority Rules As Such, But Must Be Ascertained As Mental States Of The Decision Makers Who Created Them.—

In *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979) it was held that:

> " 'discriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. *See United Jewish Organizations* v. *Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the *decision-maker* . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of,' its adverse effects upon an identifiable group." (Emphasis added.)

The purpose must be found in the mind of the *decision-maker*. It cannot exist in the air or independently in the

---

in deciding "genesis" to what it supposed to be the motives or purposes of the IAM's actions although they manifestly could have no relevance to the reasons why Pullman and the USW decided on departmental seniority units in their contracts (624 F.2d at 532; Pet.App. 14a).

[9] *Rostker* v. *Goldberg*, _____ U.S. _____, 49 LW 4798, 4802 (June 25, 1981).

seniority rules. The validity of the seniority system or systems they constitute must be analyzed by inquiring into the decision-making procedures by which they were formed, who the decision-makers were, and what decisions they made.

Teamsters, 431 U.S. at 345, recognizes that it is "[an] employer and [a] union who jointly [create] and maintain [a] seniority system." The IAM and USW did not act jointly with each other in dealing with Pullman. Each bargained separately for separate Pullman contracts. The motives of the IAM may not have been at all the same as those of Pullman or the USW. In any event, decisions made by Pullman and the USW at the bargaining table could not be the result of the IAM's state of mind.

What the Fifth Circuit mistakenly conceived of as the seniority system at Pullman was actually the product of numerous events or decisions, principally the NLRB decision in 1941 that separate electricians' and machinists' craft units were appropriate for collective bargaining, the NLRB decisions in 1942 and 1944 to redefine that machinists unit, the joint decisions of Pullman and the USW on departmental seniority in 1942, on occupational seniority in 1947, and then in national level bargaining to go back to departmental seniority in 1954. There were also smaller decisions such as combining plant guards and janitors in one department while they were in separate *occupational* seniority units, then splitting that department in 1954, which left the already separate seniority units ever intact. Whatever the effect upon the bona fides of a joint decision relating to seniority, should it happen that the purpose of only one of the decision-makers was discriminatory, it is manifest that the state of mind of a third party having no say in the decision would not even be relevant to that of the decision-makers. No matter what motives may have been entertained by the IAM, the decisions reached by Pullman and the USW at the bargaining table must be judged solely by the evidence of *their* motives, for they were the sole makers of those decisions.

Does the Fifth Circuit's *idée fixe* of "the seniority system" as *coextensive with the plant* makes any sense, where the NLRB has certified several units in the plant for which separate unions conduct bargaining independently of the others? This is the gratuitous and wholly unreasoned basic premise of many Fifth Circuit decisions, including the present one. Thus, in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (1977), cert. denied 434 U.S. 1034, the Fifth Circuit identified as a factor in determining bona fides—

> "(2) whether the seniority units are in the same or separate bargaining units (*if the latter*, whether that structure is rational and in conformance with industry practice." [Emphasis added.]

This implies an unexplained predisposition against dividing bargaining units into smaller seniority units even if rational and customary.

In *U.S.* v. *Georgia Power Co.*, 634 F.2d (1980) the Fifth Circuit characterized its holding in the present case as follows:

> "cf. Swint v. Pullman-Standard, 624 F.2d at 532-33 (where separate bargaining units are inconsistent [sic] with industry practice and NLRB precedent, separate seniority units may be evidence of purposeful discrimination)."

Of course, in its decision herein the Fifth Circuit said nothing about the separate IAM bargaining unit as being inconsistent with industry practice, except perhaps where it said that the Bessemer "plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers." (624 F.2d at 532, Pet. App. 167). Thus, a statistical inference of inconsistency with industry practice appears to have been based on a statistical universe of three elements (Bessemer, Hammond, Butler). Nor is there any basis in the record or in fact for finding any inconsistency with NLRB cases, on the contrary the separate units were created by NLRB decisions.

In *Terrell* v. *U.S. Pipe & Foundry Co.*, _____ F.2d _____, 25 FEP Cases 1262 (1981), there were five separate bargaining units; each had a separate contract containing its own seniority rules. Yet the court's opinion repeatedly spoke of the aggregate of all these as "*the* seniority system" and held four of the unions liable for not trying to merge their seniority rules plant-wide. The opinion says (25 FEP Cases at 1268):

> "This same test has caused us . . . to hold a union liable for a seniority system which resulted from agreements negotiated by another union. In Carey v. Greyhound Bus. Co., Inc., 500 F.2d 1372 (5th Cir., 1974), for example, we held the conduct of a union to be violative of Title VII though 'disguised by a thin veneer of racial neutrality.' This apparent neutrality stemmed from the fact that the union could not negotiate directly with the bus company about the seniority of its members who would transfer to another unit represented by another union. We discerned that the union had not even made a 'concerned attempt' to rectify discriminatory practices since it had not 'actively sought' *plant seniority*. . . . In Myers v. Gilman Paper Co., [554 F.2d 837, cert dismissed 434 U.S. 801], we likewise held a non-signatory union liable for seniority provisions in another union's bargaining agreement on the ground that '[i]t is settled that Title VII required [the non-signatory union] at some point to take "the affirmative step to initiate negotiations in an effort to salvage for its own ex-members the seniority that they would inevitably and foreseeably lose [upon transfer]." ' 549 F.2d at 852 (quoting Carey, 500 F.2d at 1379).

Now this reasoning has dispensed entirely with proof of purpose or motive. In their place, seniority less than plantwide has been equated with bad faith. It holds a party strictly liable for having failed to seek by concerned action, plantwide application of seniority in the teeth of *Teamsters*' holding to the contrary. In particular, see 431 U.S. at 355 n.41:

> "In addition, there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-

> wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with an employer, in a particular plant, in a department, in a job, or in a line of progression. . . . The legislative history contains no suggestion that any one system was preferred."[18]

This was reiterated in *California Brewers Ass'n* v. *Bryant*, 444 U.S. at 608.

The Fifth Circuit calls the aggregate of seniority rules in several separate bargaining units and contracts among the production and maintenance employees at one plant "the seniority system". If it then finds a racially discriminatory motive with respect to only one contract, it holds that all the contracts fail the test of bona fides, being judged as a single system; notwithstanding entirely proper motives of the parties to the other contracts.

We believe this approach cannot survive analysis. *California Brewers Ass'n* v. *Bryant*, 444 U.S. at 605 pointed out that neither Title VII nor its legislative history defined seniority system; that it was appropriate to consider the term according to the commonly accepted notions of seniority and cited as a pertinent definition of system, a "complex unity formed of many often diverse parts subject to *a common plan* or serving *a common purpose*." (444 U.S. at 606, n. 15; emphasis added.) The contours a seniority system are thus bounded by the extent of a common plan or a common purpose — not by the

---

[18] At all times material to this case, 29 U.S.C. §159(b) has provided that the *National Labor Relations Board* —

> " . . . shall decide in each case whether, in order to assure the employees the fullest freedom in exercise the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the *employee unit, craft unit, plant unit, or subdivision thereof*; . . . " [Emphasis added.]

Board findings of fact in 1941 were conclusive on courts "if supported by evidence". Wagner Act §10(e).

boundaries of a plant or its work force of production and maintenance employees.

> "Seniority systems, reflecting as they do not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all *sizes* and shapes." 444 U.S. at 608.

The appropriateness of a separate Machinists craft unit was decided by the NLRB, not by the employer or unions. It was not a seniority rule. It merely provided the basis upon which Pullman and the two unions respectively were required to bargain over seniority rules, and when they did bargain each negotiated distinctly different seniority rules. Independent decision-making processes were followed and each union had its own motives and purposes. As a matter of historical fact, these two unions were usually at cross-purposes. One favored, one opposed, a separate machinists' craft unit. One eventually swallowed up two-thirds of the other's certified unit, rejecting the rest as scabs who crossed its picket lines (17 FEP Cases at 739; Pet. App. 42a; JA 174-76, 338). They never bargained jointly and the USW wound up with departmental seniority units and the IAM with occupational seniority units. They were looking out for different sets of employees having different economic interests. There simply is no purpose or plan common to the two sets of seniority rules evolved in the two unions' contracts. Therefore, each is a seniority system and the *bona fides* of the USW seniority system must be judged on its own merits.

The complaint and both amended complaints in this case alleged that—

> "*All* matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs . . . have been, at all times material to this action, governed and controlled by *collective bargaining agreements entered into between the International Union, United Steelworkers, and the Company and/or local supplemental agreements . . . entered into between Local 1466 and*

> *the Company. Under and pursuant to the terms of the aforementioned agreements*, the defendants have established a promotional and *seniority system*, the design, intent and purpose of which is to continue and preserve . . . the defendants' policy, practice, custom and usage of limiting the employment and promotional opportunity of Negro employees of the Company because of race or color." [Emphasis added.] (JA 15-16, 20-21)

Not one word is said in the complaints about any other seniority system.

The pretrial order of June 5, 1974, which was never amended, limited the seniority issues to the following:

> "That a system of *departmental* seniority, even with changes made pursuant to a corrective action program with the Department of Labor, nevertheless perpetuates the effect of past discrimination in the assignment of black employees to generally less desirable departments. This issue subsumes the following assertions by the plaintiffs:
>
> "The transfer provisions under the agreement with the Department of Labor apply to only four departments; the transfer rights which are granted under such plan are inadequate by reason of the failure to provide red-circle rates and by reason of the restriction to a single exercise of such rights; and such rights of transfer do not apply to jobs in the machine shop represented by the IAM. . . ." [Emphasis added]. (JA 29).

The only *departmental* seniority was in the USW contract. The IAM contracts ever since 1944 had provided for occupational or job classification seniority units. Therefore the only system ever challenged in the pleadings[11] was the *USW* system, although transfer rights (already provided for in the

---

[11] Compare *Milliken* v. *Bradley*, 418 U.S. 717, 752, n.24 (1974), where the fact that the complaint only alleged segregation of Detroit School System was given significance in denial of inter-system busing.

Department of Labor agreement for affected employees) to the IAM bargaining unit were sought.[12]

It is quite evident that the scope of a seniority system is coextensive with the common plan or purpose which produced it or embodies it; generally speaking, it would be a function of the scope of the bargaining process by means of which it was produced. Thus, in *Teamsters*, the Teamsters Union bargained at the national level for separate but inter-related master contracts covering over-the-road drivers and city drivers respectively. The system thus encompassed all 50 of the carrier's terminals and both categories of drivers, even though there were many separate NLRB certifications. But when two unions bargain independently as these two did, in no commonly accepted or intelligible sense did they come up with a common plan, nor did they have a common purpose.

It follows that the bona fides of the departmental seniority system challenged in this case must be evaluated on the evidence of the motives and purposes of Pullman and the USW without regard to those of the IAM in negotiating its separate system.[13] There is no basis for equating seniority system with the bounds of a plant. As held in *California*

---

[12] Neither IAM nor Local 372 was ever named in an EEOC charge and each was added as a party on the eve of the first trial for the sole purpose of permitting *changes* to be made in its contract which would include retroactive individual seniority remedies but not merger or abolition of the IAM bargaining unit.

[13] Acts of one school "system" cannot be vicariously attributed to another, although both are political subdivisons of the same State created by a neutral legislative body. School system lines may not be ignored or treated as a mere administrative convenience, in the interest of increased racial balance. *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

> "To the extent that the inquiry should properly focus on the state legislature . . . the actions of unrelated governmental officials would be, of course, of questionable relevance." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.20 (1980).

Brewers, 444 US at 608, seniority systems "inevitably come in all sizes and shapes". Indeed, it may well be that this USW seniority system should be considered as coextensive with the multiplant group of employees for which national bargaining has been conducted by USW since the 50's rather than simply the NLRB certified unit at Bessemer, in evaluating the motives of the USW and Pullman bargainers.[14]

---

[14] Our argument does not imply that racial gerrymandering of bargaining units separately bargaining for seniority systems, may never violate Title VII. The point here is that this claim was not and could not be made an issue here; for no EEOC charge was ever made against the IAM, it was made a party to this action for the limited purpose of enabling changes to be made in its contract, and the pleadings mentioned only the seniority system in the USW contract. The validity of a seniority system is to be determined much as the validity of the city commission government was determined in *City of Mobile* v. *Bolden*, 446 U.S. 55, by evidence of its purpose; the fact that there was an adjacent predominately black city of Pritchard and the form of its governmental system would obviously have no bearing on the purpose of the Mobile system's form. Whether the municipal boundaries were gerrymandered would present an entirely different question also. Here, the questions sought to be raised about the certification of the IAM bargaining unit and the two subsequent changes therein, are likewise not germane to the motive or purpose of the USW seniority system or its bona fides. If there were anything wrong with that IAM certification there might conceivably be various remedies from appropriate tribunals, such as decertification, remedial transfers with retroactive seniority, back pay, or forced mergers, but they would not include invalidation of the USW seniority system. *Swann* v. *Board of Education*, 402 U.S. 1, 16 (1971): "As with any equity case, the nature of the violation determines the scope of the remedy." *Milliken* v. *Bradley*, 418 U.S. at 746, holding that where the disparate treatment occurred within the Detroit School System, "the remedy must be limited to that system."

III. The Fifth Circuit's Rationale For Finding, Contrary To The District Court, That The Seniority System Was Not Bona Fide, Was Contrary To The Decisions Of This Court.—

Instead of inquiring into the motives or purposes of the relevant decision-makers, i.e., Pullman and the USW, in making the decisions by which the seniority rules in their contracts evolved, the Fifth Circuit's opinion relies primarily on matters irrelevant to that inquiry: (a) the motives of the IAM, (b) alleged discrimination in departmental assignments, and (c) once segregated facilities and similar discrimination "in the air". The only matter it relied on which calls for such discussion is "The creation of new departments in the years subsequent to unionization" (624 F.2d at 531; Pet.App. 12a).

(a) The motives of the IAM have no relation to the USW motives in bargaining for a seniority system. Nor does the Fifth Circuit ever say they do. It faults the USW's motives, not for bargaining with Pullman for departmental seniority units, but for agreeing with the IAM, with NLRB approval, to modifications of its certified bargaining unit whereby USW gained large numbers of black and white employees.[11] The Fifth Circuit said (624 F.2d at 533; Pet.App.16a):

> "The U.S.W., *in the interest of increased membership*, acquiesced in the [I.A.M.'s] discrimination while succeeding in significantly segregating the departments within its own unit."

But while the particular decision-making in question (i.e., revision of the bargaining units) did not even pertain to creation of the USW seniority system, which was created jointly with Pullman, see *Teamsters*, 431 U.S. at 330, 345, it is apparent from the Fifth Circuit's statement of its own argument that the purpose of the USW's decision here was to gain

---

[11] Compare *Milliken* v. *Bradley*, 418 U.S. 717, 750 (1974), which held that merger of a mixed, but predominately black school system, with a mixed, but predominately white school system, of course gives rise to no claim of segregative purpose or effect.

membership; if the IAM's motives were bad, the USW only acquiesced in, it did not share them, and it took the members in the departments in which it found them. This cannot be a discriminatory purpose on the part of the USW as defined in *Feeney*, 442 U.S. at 279, for that would require that the USW "selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of,' its adverse effects upon an identifiable group." There were no adverse effects on blacks in these decisions anyway, but certainly the USW's only apparent motive was to gain members, not to hurt blacks.[14] Certainly the USW must be deemed to have thought membership in it was advantageous and not detrimental, for it requires payment of dues. As for Pullman's motives for approving or acquiescing in the December, 1941, and 1944 bargaining unit changes, they are shown without dispute and by unimpeachable documentary records to be as follows: The NLRB was urging Pullman to sign the December 19, 1941 modification, by letters and phone calls; Pullman felt it didn't make much difference which union represented the classifications affected; Pullman saw no adverse effects if it signed

---

[14] It may be necessary to resolve the question of burden of proof of *bona fides* in dealing with such subsidiary matters of fact. The Fifth Circuit did not refer to burden of proof at all, simply overturning substantially all of the District Court's findings. The District Court placed the burden of proof of bona fides on the defendants, though conceding the opposite view was supported by considerable logic (17 FEP Cases at 732; Pet.App. 25a). Most lower courts place the burden on the plaintiff. *Harris* v. *Anaconda Aluminum Co.*, 479 F.Supp. 11 (N.D. Ga. 1979); *Dickerson* v. *U.S. Steel Corp.*, 439 F.Supp. 55 (E.D. Pa. 1977), vacated and remanded on other grounds sub nom. *Worthy* v. *Dickinson*, 616 F.2d 698 (3d Cir. 1980); *Edmonds* v. *Southern Pacific Transportation Co.*, 19 FEP Cases 1052 (N.D. Cal. 1979); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), cert. denied 440 U.S. 981 (1979); *Younger* v. *Glamorgan Pipe & Foundry Co.*, 20 FEP Cases 766 (W.D. Va. 1979), aff'd, 621 F.2d 96 (4th Cir. 1980) (per curiam); *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1144, 1145-46 (N.D. Fla. 1979); and we submit that this is the correct view.

subject to NLRB orders, so it signed "Since the Atlanta [NLRB] office seems to attach some importance to it" (JA 293). It signed the document "ACCEPTED: as noted below. . . . NOTE: Assuming the foregoing is satisfactory to the Board, and subject to Board orders." As for the 1944 modification, Pullman's purpose in signing was in the interest "of harmonious operation of the Bessemer plant" (JA 176), there having been numerous organizational or jurisdictional strikes up to then; it declared it had taken no position in the selection by its employees of bargaining representatives, and acquiesced in the modification "subject to any valid order or directive by public authority or requirement of law to the contrary." (JA 176). There is no evidence of any racial motive on Pullman's part. It had been hiring blacks in the IAM bargaining unit (JA 255). According to the evidence, Pullman's motives were entirely proper. Industrial peace is also a goal of Federal labor policy.

(b) As for alleged discrimination in departmental assignments, within the period of limitations, both courts below treated this as relevant (the District Court said essential) to determining the bona fides of the seniority system (15 FEP Cases at 147; 624 F.2d at 529, 531; Pet.App. 52a, 6a-8a, 10a). However, in *Teamsters*, it was established that there had been systematic and purposeful employment discrimination in hiring line and city drivers continuing well beyond the effective date of Title VII, and there were over 40 specific instances shown of such discrimination.[17] Even so, it was held that the

[17] There was not one specific instance here. The District Court found that during the post-1966 period there was a policy of active efforts to get blacks into formerly all-white jobs and no statistical basis for inferring discrimination against blacks (15 FEP Cases at 148, Pet.App.53a); "that by December 1966 the company was no longer making assignments to departments based on race — except, that is, to the extent of attempting to rectify imbalances" (15 FEP Cases at 149; Pet.App. 56a); that even as to pre-Act assignements, "The court is not however saying that racial considerations were the sole determinant of assignments. The court rather is impressed . . . that bona fide job qualifications played the decisive role in

seniority system was bona fide and such discrimination could be adequately remedied by individual awards of retroactive seniority. It did not relate to the validity of the system itself.[18] So in the present case, where from 1966 on, Pullman was busily engaging in reverse discrimination wherever it could (11 FEP Cases at 951; 15 FEP Cases 149; Pet.App.120a, 56a) and the only actual assignment data mentioned by the Fifth Circuit related to the IAM bargaining unit (624 F.2d at 529; Pet.App. 7a, 162-63) (1) which is outside the bounds of the seniority system in question; (2) which alleged discrimination could be adequately compensated by transfer and retroactive seniority to affected individuals, if any; (3) and which data if evaluated statistically in relation to availability of black machinists and millwrights in the labor market show no inference of discrimination anyhow. (Co. Ex. 307).

(c) Likewise, matters such as formerly segregated bathrooms and other discrimination "in the air" we have previously shown also to be irrelevant to bona fides of a seniority system. This sort of evidence was present in *Teamsters*, yet it did not defeat the bona fides of the seniority system.[19]

---

assignments to many of the key jobs and departments. . . ." (15 FEP Cases at 148, n.13; Pet.App.55a, n. 13). The Fifth Circuit's rejection of these findings was based on consideration of a small number of assignments of machinists and millwrights in the IAM units and disregard of evidence of work force demographics (Co. Ex. 307, 351) and statistical methodology (624 F.2d at 529, Pet.App.7a), making its reasoning entirely unacceptable as a basis of disregarding Rule 52(a).

[18] *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1103, 1133-34 (N.D. Fla. 1979): "In line with the case law dating both before and after the Teamsters decision, this court must conclude that evidence of discrimination in the arrangement and staffing of lines of progression is not probative of bias in the seniority system"

[19] Likewise, in *City of Mobile* v. *Bolden* , 446 U.S. 55, 74 (1980) such discrimination in the air was held not to prove purposeful discrimination in adoption of a commission system of city government: " . . . the District Court and the Court of Appeals sup-

What the Fifth Circuit has done is to take the enumeration of cuicircumstances in *Teamsters* and fashioned them into a four part obstacle course in which the essential holding of *Teamsters*, the good faith state of mind of the decision-makers when they agreed on the system, has been lost sight of.[20] This fourfold test is applied mechanically in a framework wherein the seniority "system" is gratuitously taken for granted to be of plantwide scope and where the purpose of one actor is attributed to another on the ground that the latter acquiesced in the former's actions. What we have is result-oriented reasoning which if applied to the facts of *Teamsters* or to any unionized plant in the South would condemn all their seniority systems. In this manner the result in *Teamsters* is now regularly avoided in the Fifth Circuit.

---

ported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn . . . action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question."

[20] The Fifth Circuit's process of reasoning in this manner was entirely similar to that which this Court's opinion described and rejected in *City of Mobile* v. *Bolden*, 446 U.S. at 72-73, as follows: ". . . the Court of Appeals acknowledged that the Equal Protection Clause . . . reaches only purposeful discrimination, but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in Zimmer v. McKeithan, [485 F.2d 1287]. Thus, because the appellees had proved an 'aggregate' of the Zimmer factors, the Court of Appeals concluded that a discriminatory purpose had been proved. . . . Although presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called Zimmer criteria . . . were most assuredly insufficient to prove [a] discriminatory purpose. . . ."

IV. The Fifth Circuit Disregarded F.R.Civ.P. Rule 52(a) By Setting Aside Findings Of The District Court Which Were Not Clearly Erroneous.—

The District Court cast its findings concerning seniority according to the four-part prescription which the Fifth Circuit formulated from *Teamsters* in *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d at 351. It found three of these factors (neutrality, rationality, purposes) favorably to defendants (17 FEP Cases at 733-39; Pet.App. 28a-44a) and that the fourth (genesis) favored plaintiffs only "if causation be ignored and the existence of other discrimination be deemed sufficient". In other words, if what we have called "discrimination in the air" is sufficient to prove "genesis", then "The 'genesis' factor may be said to be favorable to the plaintiffs. . . ." (17 FEP Cases at 739, n.22; Pet. App. 44a, n.22). We have argued above that genesis means purpose with particular reference to original creation of the seniority system and that it cannot properly be considered as a factor separate from "purpose" or, consistently with *Teamsters*, equated to discrimination in the air. In the final analysis the District Court thus found all the facts in defendants' favor on the question of bona fide seniority system, and in any event found the totality of the evidence showed no purposeful discrimination in connection with the establishment or continuation of the seniority system (17 FEP Cases at 739; Pet.App. 44a).

(1) *Neutrality of System.* — The District Court found the system facially neutral in the same sense it was in *Teamsters* (except to the extent the 1972 agreement with the Department of Labor required reverse discrimination). It was applied equally to all races (17 FEP Cases at 733; Pet. App. 28a-29a). The Fifth Circuit refused to apply F.R.Civ.P. 52(a) to any District Court findings, whether or not supported by evidence, but made its findings de novo, giving this explanation (624 F.2d at 525, n.6; Pet. App. 15a, n.6):

> "Findings of fact by the district court in Title VII are not to be set aside unless they are clearly erroneous . . . , that is, unless the appellate court is 'left with the definite

and firm conviction that a mistake has been committed.' . . . When findings, however, are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand."

The rationale seems to be that if the Fifth Circuit disagrees strongly enough with the end result, it rewrites the facts. It made no examination of the District Court's findings in detail and did not ascertain whether severally they were supported by evidence. As for the alternate ground for disregarding Rule 52(a) that the District Court entertained "an erroneous view of controlling legal principles", the Fifth Circuit did not identify a single erroneous legal view of the District Court or explain how any such view entered into any particular finding. The Fifth Circuit implicitly found (624 F.2d at 530-31; Pet.App.10a) the seniority system was not neutral because "by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites." This is a resurrection by paraphrase of the "perpetuation of past discrimination" criterion which *Teamsters* expressly held was not a basis for invalidating a seniority system. The District Court's opinion correctly analyzed *Teamsters* (17 FEP Cases at 733-34; Pet.App. 28a-30a) as signifying by neutrality the same characteristics in the Teamsters' contracts as exists in the U.S.W.-Pullman seniority system,[21] and correctly rejected the idea that evidence of relative economic desirability is relevant if it favors plaintiffs but irrelevant if it favors defendants (17 FEP Cases at 734; Pet.App.30a).[22]

---

[21] It was also held in *City of Mobile* v. *Bolden*, *446* U.S. 55 at 67-68, that proof of disproportionate effect is not sufficient to show discriminatory purpose or intent in adopting a system of city government. A seniority system is "neutral" in the same sense that the Mobile city commission government was neutral, although only white commissioners had ever been elected. Where the system "is readily explainable on grounds apart from race, . . . disproportionate effect alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." 446 U.S. at 70.

[22] The Fifth Circuit disregarded elementary principles of evidence and common sense in so holding. F.R.E.Rule 401: " 'Relevant

As for "rationality", the District Court pointed out (17 FEP Cases at 734; Pet.App.30a-31a) that "It may well be that — [in *Teamsters,*] in discussing the restriction against transfers to line driver jobs as involving separate bargaining units, which was itself viewed as rational, in accord with industry practice, and consistent with NLRB precedents — the Supreme Court was not proposing a standard for Section 705 (h), but was rather highlighting facts which demonstrated the bona fides of the seniority rule in question." However, the District Court concluded it was bound by the Fifth Circuit's decision in *James* v. *Stockham Valves,* 559 F.2d 310 (1977), cert. denied 434 U.S. 1034, to deal with rationality and consistency with industry practice as if a separate element of bona fides. Although a number of courts have endorsed the *James* four-part formula, the Court recognized in *California Brewers Ass'n* v. *Bryant,* 444 U.S. 598 that "Significant freedom must be afforded employers and unions to create differing seniority systems", they "inevitably come in all sizes and shapes", and reflect "the give and take of free collective bargaining." Indeed, that "*It does not behoove a court to second-guess that process or its products.*" *California Brewers* thus approved as bona fide a seniority rule which was unusual and not like most seniority systems. The District Court's conjecture that *Teamsters* did not attach controlling importance to "rationality and consistency with industry practice", but cited that particular as a sort of circumstantial corroboration of bona fides, thus seems more in keeping with this Court's decisions, than the talismanic effect given to the *James* factors by the Fifth Circuit.

---

evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable. . . .*" [Emphasis added.] Michael and Allen, *The Trial of an Issue of Fact,* 65 (1934): "We must take account of the total amount of relevant knowledge regardless of whether it is favorable or unfavorable." *United States* v. *Morgan,* 581 F.2d 933 (D.C. Cir. 1978). If it be of consequence to the determination of the action to measure the economic effects of a seniority system, the good effects have to be weighed with the bad, yet the Fifth Circuit says the former are irrelevant.

In any case, the District Court found that (17 FEP Cases at 735; Pet.App.32a):

> "In context, and taken as a whole, the seniority units at Pullman's Bessemer plant constitute a rational structure. They are, moreover, consistent with practices which were at the time generally followed at other unionized plants throughout the country, at other companies in the same industry, and indeed at Pullman plants located outside the South when race was presumably not a potential consideration."

These findings were well supported by undisputed evidence that the departmental structure in the USW bargaining unit was quite similar to that in other car building plants and that the modal or most prevalent kind of seniority system in car plants and in U.S. industry generally was of the departmental kind (17 FEP Cases at 735, Pet.App. 33a). The District Court further found (17 FEP Cases at 734, Pet.App. 31a) that, given the economic conditions under which the Bessemer plant must operate, "the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumping or displacement, highly inefficient performance, or excessive grievances over ability factors, or all of them." Although these findings were founded on substantial evidence, and the Fifth Circuit did not question that, it reversed all of these findings. It substituted its own finding (624 F.2d at 531, Pet. App. at 11a) that "The establishment and maintenance of segregated departments appear to be based on *no other considerations* than the objective to separate the races" [Emphasis added], totally disregarding the evidence of substantial economic reasons for departmental administration of seniority credited by the trial court,[23] and

---

[23] Compare *City of Mobile* v. *Bolden*, 446 U.S. at 71, n.17: "If the . . . Court meant by its statement that the existence of the at-large electoral system was . . . unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile." In this case, the history of the USW-Pullman seniority system explained its non-racial purpose.

asserting (624 F.2d at 533, Pet.App.16a) that "No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers." This totally disregards the findings and the evidence, particularly the fact that at all material times the large majority of black employees have been in racially well-mixed departments; and infers contrariness to industry practice from a statistical universe of three Pullman-Standard plants (Bessemer; Hammond, Indiana; and Butler, Pennsylvania), and in total disregard of the legislative mandate to the NLRB in §9(b) of the Labor-Management Relations Act, 29 USC §159(b), that—

> "The *Board* shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collector bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." [Emphasis added.]

Clearly the existence of separate craft bargaining units and units of all other employees has been commonplace ever since passage of the Wagner Act. Such existence supported by NLRB certification cannot possibly be considered as evidence of contrariety to industry practice. Sometimes a union petitions for a craft unit, sometimes not. Sometimes employees vote against a craft unit. So the Board quasi-legislatively imposes this bargaining unit structure sometimes, and sometimes does not, and certainly the industry practice of abiding by lawful NLRB rulings explains completely why this difference between Bessemer, Hammond, and Butler exists. Other Pullman plants had bargaining units consisting of fewer than all production and maintenance employees anyway. See footnote *4*, supra.

Furthermore, as previously shown, the only seniority *system* in controversy is the set of rules bargained for between Pullman and USW. The IAM unit has its own *occupational*

seniority system based on what that union demanded as best suited for its craft members, with no plan or purpose common to the two systems. The fact that under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 758, the courts can order transfer of individuals discriminated against into that bargaining unit with retroactive seniority furnishes an adequate remedy to such individuals, if any (none were shown), does not have any bearing on the question whether there are two separate seniority systems whose bona fides is tested separately under §703(h).

The Fifth Circuit constantly confuses the concepts of separate bargaining units and separate seniority units. The existence of separate bargaining units certainly is explained completely by the fact that the NLRB certified them. The motives of the NLRB, the decision-maker in that, have not been impugned at all, but even if the motives of the IAM[24] were bad,

[24] The NLRB hearing transcript in 1941 (JA 108) showed that the IAM sought to represent a craft unit composed of

> "all machinists, apprentices and helpers in the maintenance and other departments where they work, namely the wheel and axle shop, the machine shop, the tool and die shop, and the air brake department."

After considerable wrangling over craft lines at the NLRB hearing, the IAM representative stated that he sought a unit of everyone he could represent under the union's constitution (JA 146-47), specifically including black employees (JA 144-45, 149). The NLRB Decision and Direction of Election (JA 155-56, 163-64) specifically found the unit sought by the IAM was an appropriate craft unit. Following the election and Board certification the unions under Board auspices agreed in writing to corrections of the unit descriptions to move some non-craft employees, mostly black, from the IAM to the USW Unit. After a month of NLRB urging Pullman indicated its acceptance of this (JA 170-71) and it was made an addendum to the initial IAM and USW contracts. The IAM unit was not all-white after this transaction, however for there were four black employees in it in 1944 (JA 255; P.Ex.63, p.3; P.Ex. 1, p.19; P. Ex. 2, Welding Department, p.2). Following some organizational or representational strikes in 1944 the USW petitioned for certifica-

the evidence shows the USW opposed separate bargaining units (17 FEP Cases at 733, Pet.App. 42a; JA 107, 155, 288, 291-92), and Pullman took no position for or against them at any time (17 FEP Cases at 739, Pet.App.42a-43a; JA 110, 155, 293). Once it is recognized that Pullman and USW had no real choice but to bargain in accordance with the Board certifications (JA 140, 146), it is perfectly obvious why the USW and IAM fractions of the Die & Tool Department, and of the Maintenance Departments, wound up in separate seniority groupings as well as separate bargaining units. For the law is plain that these respective unions became the statutory[11] *exclusive* representative of all the employees in such units in respect to rates of pay, wages, hours of employment, or other conditions of employment. The USW could no more bargain about who could hold seniority (i.e., be an employee) as a millwright or machinist, or how it is measured, accrued, applied, etc., than it could bargain for rates of pay for those classifications. Similarly, the IAM could not bargain about seniority rights of any job-holders exclusively represented by the USW. Even before the Taft-Hartley amendments in 1947 made insistence on such bargaining a union unfair labor practice, *Douds* v. *Int'l Longshoremen's Ass'n*, 241 F.2d 278 (2d Cir. 1947); *Local 323, IBEW (Hoff Electric Co.)*, 242 NLRB 305 (1979), either union was simply without legal authority to bargain over seniority in jobs in the other's bargaining unit. The circumstances were different in *Teamsters*, where the same parent union bargained for master contracts covering about a hundred bargaining units. Here,

---

tion as representative of *all* employees in the IAM unit, but withdrew its petition when the IAM agreed to surrender to the USW some 100 out of the 150 employees in its unit, retaining only machine shop personnel and millwrights, who had crossed the USW picket lines, and whom the USW declined to represent, as "scabs." (JA 337-38). While the Fifth Circuit assails the IAM's principal motives as "obvious[ly] . . . in 1941 to exclude black workers from its bargaining unit", the direct evidence introduced is entirely to the contrary.

[11] 29 USC §159(a)

these unions were not acting in concert with one another in bargaining with Pullman, and it was a practical if not inevitable result of the law that the fractions of the Die & Tool and Maintenance Departments in the separate bargaining units became, as the result of separate bargaining, separate seniority units too (JA 140 at n.19).

(3) *Genesis.* — The term properly means purpose, motive or causation with particular reference to origin or beginning; as such, discrimination in the air, which was present in abundance in *Teamsters,* is not a basis for inferring discriminatory genesis. The District Court properly found that (17 FEP Cases at 739, n. 22, Pet.App.44a, n.22)

> "The 'genesis' factor may be said to be favorable to the plaintiffs if causation be ignored and the existence of other discrimination be deemed sufficient."

The Fifth Circuit's opinion (624 F.2d at 532, Pet. App.-12a-14a) is somewhat fuzzy about the meaning of "genesis"; but in the end equated it with discrimination in the air. The Fifth Circuit finds there was formerly extensive segregation at the Bessemer Plant; that the "motives and intent of the IAM in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination" without regard to any causative relation to the decision-making process as between the USW and Pullman; and "The record makes clear that blacks were restricted from the better jobs under the first USW contract" (624 F.2d at 532, Pet.App.14a). Based on these findings, the Fifth Circuit concluded "that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." While it is true there was formerly extensive segregation at the Bessemer plant, this factor existed in comparable degree in the *Teamsters* case, and appears to have had no causal relation to the seniority system in either case. It is a gross fabrication that blacks were restricted from better jobs under the first USW contract. That contract did not mention race or any restriction from better jobs. If there was any such restricton it was extraneous to the

contract. The metaphor that considerations of race "permeated the negotiation and the adoption of the seniority system *in 1941*" asserts that there was discrimination in the air, not causal effect on decision-making; and the Freudian slip on the date[26] shows the Fifth Circuit confuses NLRB certification of separate units (November 19, 1941, JA 161-66, amended December 19, 1941, JA 170-71) with adoption of seniority systems. There was no seniority system in 1941. Under *California Brewers*, 444 U.S. 598, 608,

> ". . . against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment . . . [s]ignificant freedom must be afforded *employers and unions* to create different seniority systems." [Emphasis added.]

Seniority systems are creatures of contract, created by collective bargaining between unions and employers. The NLRB decisions determined the bounds of the bargaining units in 1941, but the seniority systems and seniority units arose only in 1942 as the result of the separate collective bargaining negotiations. The Fifth Circuit keeps referring to bargaining units erroneously as seniority units (624 F.2d at 533, Pet.App. 16a). Genesis of the USW seniority system must refer to the latter decision-making process.

(4) *Motive or Purpose.* — The District Court found "that the seniority system between the Company and the USW has been negotiated and maintained free from any discriminatory purpose" and did so after it "carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years." (17 FEP Cases at 739, Pet.App. 43a). The Fifth Circuit flatly rejected these findings and substituted its own that "There is no doubt . . . about

---

[26] The first USW and IAM contracts were both agreed to on April 7, *1942* (JA 167, 180).

the existence of a discriminatory purpose" (624 F.2d at 533, Pet.App. 15a). Then it says that was the *IAM's* purpose but USW acquiesced in it (624 F.2d at 533, Pet.App. 16a) and "No credible explanation has been advanced to sufficiently justify the separate seniority units meaning, of course, bargaining units (624 F.2d at 533, Pet.App.16a).

We have previously shown some errors in this rationale. At this point we wish to emphasize that the *decision-maker* must have acted because of and not merely in spite of adverse consequences on some ascertainable class before discriminatory purpose can be found. It was not the NLRB decisions which created the USW-Pullman seniority system; it was not the decisions of IAM; but it was the joint decisions of Pullman and the USW which must be examined to determine the bona fides of the seniority rules they negotiated and adopted. The facts support no inference of discriminatory purpose of those decisions or of the system in existence in the USW bargaining unit when the statute of limitations applicable to this case began to run.

The first such decision was made in 1942 to adopt a departmental seniority clause. This was proposed by the USW biracial bargaining committee and accepted by Pullman (17 FEP Cases at 738, Pet.App. 40a; JA 181, 261, 265, 267-69). There was no evidence that either of them contemplated any adverse effect on either race. As there were no enforceable seniority rights until then, it would seem to contemplate conferring benefits on both races not previously enjoyed. Until then, Pullman could have laid off all blacks before any whites, or vice versa, or could have retained employees of both races strictly on the basis of ability to do the work. There is no evidentiary basis of racially discriminatory purpose in this decision.

The second significant decision was made in 1974, when, as proposed by black USW negotiating committeeman Gus Dickerson (17 FEP Cases at 738, Pet.App. 41a; JA 256, 274) occupational seniority units were agreed on in the USW con-

tract (JA 189). There was no direct evidence of the motive for this change. To the extent that it represented some increased restraint on upward (as well as downward and lateral) job mobility of all employees, any circumstantial evidentiary effect that might have on the question of motive is cancelled by the third decision. Pullman could well have been motivated by efficiency considerations, keeping people of both races to the maximum extent in familiar jobs. Black employees may have thought their job security against displacement would be enhanced by occupational seniority.

The third decision in 1954 was to go back to departmental seniority. This returned the seniority rules at Bessemer to the same departmental basis as those at Hammond, Indiana, where the black percentage was small (JA 242), and Butler, Pennsylvania, where it was less than 1% (JA 206). If, as the Fifth Circuit uncritically takes for granted, the smaller the seniority unit size, the more disadvantage to blacks, how could this third decision be evidence of anti-black motivation? On the contrary, given that assumption, it would indicate motivation of favoring blacks. Indeed, since whatever separation of the races there was in the USW bargaining unit at Bessemer was by job classification and not by department (the great majority of blacks were in racially mixed departments from 1941 forward), (JA 243-51; 539 F.2d at 86; Pet.App. 77a) the 1954 decision could only indicate a purpose of moving away from contractual restrictions on mobility. The fact that Butler had similar departments and departmental seniority but practically no black employees indicates no improper purpose in going to the same arrangement at Bessemer. The fact that the IAM bargaining unit had an occupational seniority system since 1944 likewise indicates no improper purpose of departmental seniority units in the USW contracts.

The fourth decision, in the 1969 and 1972 affirmative action agreements with the Department of Labor, was to adopt deliberately racial preference for blacks (See Summary at 17 FEP Cases at 732-33, Pet.App. 27a).

Departmental changes. — Other decisions about seniority which were shown not to be racially motivated included rejection by unanimous and largely black vote of a Pullman proposal to merge several departments (17 FEP Cases at 735, Pet.App.34a; JA 54-61). The Fifth Circuit refers particularly (624 F.2d at 531-32, Pet.App.12a) to the white plant guards and black janitors being combined in the same department (but different job classifications and therefore different seniority units) on the seniority roster of February 1, 1951, but being moved back into separate departments on September 1, 1954. The point is they were always in separate seniority units, because September 1, 1954 was when the seniority units were changed back to departmental from occupational. The work of guards and janitors obviously has very little in common and nobody's seniority was affected or otherwise disadvantaged either by the merger or the separation. Even more significantly, when white Union President Ethridge proposed merging the janitors and plant guards again in 1962 (P. Ex. 104), black union committeeman (later Union President, JA 80, 82, 84) Perry Thompson, a janitor, vigorously protested that he would quit his job first, and the proposal was dropped (JA 238). This evidence shows no invidious motive, then. The basic departmental structure remained largely the same for 40 years. A number of organizational changes were practically necessitated by the NLRB bargaining unit certifications and changes therein; some were made when organizational seniority was adopted in 1947 and unmade upon the return to departmental seniority in 1954, so that there was no effect on seniority groupings either time. The only real changes in *seniority* groupings after 1942 were these: Two large, racially well mixed departments (Paint and Shipping Track) were combined September 1, 1954. The Inspection Department was formed from inspectors, then all white, March 1, 1949, which was during the era of occupational seniority, dissolved three months later, and formed again June 1, 1950. This was the only significant newly created department since certification, but even so, involved a

small number of employees.[27] While the Fifth Circuit refers to indications of "attempts to maintain one-race departments" the empirical fact is that the attempts, if any, must have been astonishingly ineffective inasmuch as over 90% of the employees were always in mixed departments. This fact and the return to departmental seniority in 1954 both show without serious question that to the extent there was racial discrimination at Bessemer, it existed in spite of and not because of the departmental system, and the Fifth Circuit simply arrogated the fact-finding function in disregard of Rule 52(a) under color of asserting the District Court made its findings under some unspecified erroneous view of the law (624 F.2d at 533, n.6, Pet. App. 15a, n.6). There was nothing wrong with the District Court's legal principles and certainly nothing that would justify total disregard of Rule 52(a), which is just as applicable to this type case as any other.

The truth is that the Fifth Circuit's decision is result-oriented, not fact-oriented; ideological, not logical. The cause of racial equality is not well served by disregard for evidence and due legal procedures, and the decision of the Fifth Circuit should be reversed.

---

[27] The departmental seniority status of inspectors resulted from two decisions: to collect them in one department in 1951, which could not be racially motivated because their seniority then was occupational; and the decision to go back to departmental seniority in all USW departments in 1954, which if racially influenced, could only favor black mobility. The end result is criticized by plaintiffs, but was the accidental product of two decisions not motivated by anti-black sentiment. The separateness of Inspection Department is both commonplace and common sense. (17 FEP Cases at 735, 736-37, Pet. App. 32a, 37a).

CONCLUSION

The decision and judgment of the Court of Appeals for the Fifth Circuit should be reversed, and judgment rendered for defendants adjudging that the seniority system adopted by Pullman and USW is bona fide and denying all relief based on said seniority system.

Respectfully submitted,

SAMUEL H. BURR
Counsel of Record

C. V. STELZENMULLER
D. FRANK DAVIS
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203
(205) 251-3000

F. B. SNYDER
200 South Michigan Avenue
Chicago, Illinois 60604

Attorney for Petitioner
Pullman-Standard

Of Counsel:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203

Nos. 80-1190 and 80-1193

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD,
a Division of Pullman, Incorporated
Petitioner,
v.
LOUIS SWINT and WILLIE JOHNSON,
Respondents.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO and LOCAL 1466,
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,
v.
LOUIS SWINT and WILLIE JOHNSON,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONERS UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO

LAURENCE GOLD
AFL-CIO
815 - 16th Street, N.W.
Washington, D.C. 20006

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF, GOTTESMAN, COHEN
CHANIN, WEINBERG & PETRAMALO
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202-833-9340)

[Additional Counsel listed on inside cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BERNARD KLEIMAN
General Counsel
United Steelworkers of
America, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
United Steelworkers of
America, AFL-CIO
Five Gateway Center
Pittsburgh, Penna. 15222

JEROME A. COOPER
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Ala. 35203

Counsel for Petitioners, United
Steelworkers of America, AFL-CIO
And Local 1466, United
Steelworkers of America, AFL-CIO

QUESTIONS PRESENTED

This Court limited the writs of certiorari to the first question presented in each of the petitions. Accordingly, the questions presented are as follows:

1. Whether a federal court of appeals is bound by the "clearly erroneous" rule of F. R. Civ. Pro. 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system.

2. Did the Court below apply wrong legal criteria in determining the bona fides of the seniority system?

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the court of appeals: International Association of Machinists and Aerospace Workers (IAM), and its Local No. 872. Respondents Louis Swint and Willie Johnson have been certified in this action as representatives of a class consisting of all black persons employed by Pullman at its Bessemer, Alabama plant as production and maintenance employees in the bargaining unit represented by petitioner United Steelworkers of America at any time since one year prior to the filing of the first EEOC charge. (It was determined below that the first such charge was filed on March 27, 1967).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
A. Procedural Overview	3
B. The Findings Of The District Court And The Relevant Record Evidence	4
1. Background Facts	5
2. The District Court's Findings With Respect To The Motivation Of The Seniority System	9
a. Findings As To Evidence Affirmatively Showing That The Seniority System Was Not Discriminatorily Motivated	9
b. Findings As To Respondents' Contentions That Discriminatory Motivation Should Be Inferred From Evidence Concerning Matters Other Than the Seniority System	19
C. The Court of Appeals' Opinion	26
SUMMARY OF ARGUMENT	27
ARGUMENT	29
CONCLUSION	49
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
Bostic v. Boorstin, 617 F.2d 871 (CA DC, 1980)	32
Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563 (CA 5, 1979), *reversed on other grounds*, —— U.S. —— 49 L.W. 4214 (1980)	31
California Brewers v. Bryant, 444 U.S. 598	30
Causey v. Ford Motor Co., 516 F.2d 416 (CA 5, 1975)	31
Commissioner v. Duberstein, 363 U.S. 278	36
Crawford v. Western Electric Co., 614 F.2d 1300 (CA 5, 1980)	31
Danner v. United States Civil Serv. Comm'n, 635 F.2d 427 (CA 5, 1981)	31
Dayton Board of Education v. Brinkman, 443 U.S. 526	28, 37
Duckett v. Silberman, 568 F.2d 1020 (CA 2, 1978)	32
Duke Power Co. v. Carolina Env. Study Group, 341 U.S. 59	38
East v. Romine, Inc., 518 F.2d 332 (CA 5, 1975)	31
EEOC v. Chesapeake & O. Ry., 577 F.2d 229 (CA 4, 1978)	32
Franks v. Bowman Transportation Co., 424 U.S. 747	30
Garval v. Arthur G. McKee, —— F.2d ——, 25 FEP Cases 1565 (CA 9, 1981)	32
Guzman v. Pichirilo, 369 U.S. 698	38
James v. Stockham Valves and Fittings Co., 559 F.2d 310 (CA 5, 1977)	11
Kendrick v. Comm. of Zoological Subdistrict, 565 F.2d 524 (CA 8, 1977)	32
Kunda v. Muhlenburg College, 621 F.2d 532 (CA 3, 1980)	32
McAllister v. United States, 348 U.S. 19	38
Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (CA 5, 1978), *cert. denied*, 441 U.S. 968	31
Peurifoy v. Commissioner, 358 U.S. 59	38
Phillips v. Joint Legislative Com., 637 F.2d 1014 (CA 5, 1981)	31

TABLE OF AUTHORITIES—Continued

	Page
Silberhorn v. General Iron Works Co., 584 F.2d 970 (CA 10, 1978)	32
Smith v. South Central Bell Telephone Co., 518 F.2d 229 (CA 6, 1975)	32
Stewart v. Geenral Motors Corp., 542 F.2d 445 (CA 7, 1976), *cert. denied*, 433 U.S. 919	31
Sweeney v. Bd. of Trustees of Keene State College, 604 F.2d 106 (CA 1, 1979), *cert. denied*, 444 U.S. 1045	32
Teamsters v. United States, 431 U.S. 324	*passim*
Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112 (CA 5, 1981)	11, 21
Texas Department of Community Affairs v. Burdine, —— U.S. ——, 49 L.W. 4214 (March 4, 1981)	30
Thompson v. Leland Police Dept., 633 F.2d 1111 (CA 5, 1980)	31
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63	29, 30
United Airlines, Inc. v. Evans, 431 U.S. 553	30
United States v. duPont & Co., 351 U.S. 377	38
United States v. Gypsum Co., 333 U.S. 364	35
United States v. Oregon Med. Soc., 343 U.S. 326	37
United States v. Parke Davis & Co., 362 U.S. 29	35-36
United States v. Real Estate Boards, 339 U.S. 485	34
United States v. United States Steel Corp., 371 F.Supp. 1045 (N.D. Ala. 1973), reversed in part on other grounds, 520 F.2d 1043 (CA 5, 1975), cert. denied, 429 U.S. 817	11
Whitfield v. United Steelworkers, 263 F.2d 546 (CA 5, 1959)	11
Williams v. Tallahassee Motors, Inc., 607 F.2d 689 (CA 5, 1979)	31
Wright v. Rockefeller, 376 U.S. 52	38
Zenith Corp. v. Hazeltine, 395 U.S. 100	38

TABLE OF AUTHORITIES—Continued

Page

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e:
§ 703(h), 42 U.S.C. § 2000e-2(h) ..... *passim*

Rules:

Federal Rules of Civil Procedure:
Rule 52(a) ..... *passim*

Miscellaneous:

Executive Order 11246 8
5A Moore's Federal Practice, § 52.01 33
Gunnar Myrdal, *An American Dilemma* (1944) 11
9 Wright and Miller, Federal Practice and Procedure, § 2587 33-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1190 and 80-1193

PULLMAN-STANDARD,
a Division of Pullman, Incorporated
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO and LOCAL 1466,
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

On Writs of Certiorari to the United States Court of Appeals For The Fifth Circuit

---

BRIEF FOR PETITIONERS UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO

This brief is the joint product of petitioners United Steelworkers of America (USW) and its Local 1466, and of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation

of national and international unions with which USW is affiliated. The decision to file a single brief reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position once and not twice.

OPINIONS BELOW

The original opinion of the district court is reported at 11 FEP Cases 943 (N.D. Ala. 1974), and is reprinted in the separate appendix to the petition in No. 80-1193 as App. F. (117a-155a). The first opinion of the court of appeals is reported at 539 F.2d 77 (CA 5, 1976), and is reprinted as App. E (67a-116a). The opinions of the district court on remand are reported at 15 FEP Cases 155 (N.D. Ala. 1977), 15 FEP Cases 1638 (N.D. Ala. 1977), and 17 FEP Cases 730 (N.D. Ala. 1978), and are reprinted respectively as App. D (48a-66a), App. C (45a-47a) and App. B (23a-44a). The second opinion of the court of appeals—the decision under review—is reported at 624 F.2d 525 (CA 5, 1980), and is reprinted as App. A (1a-22a).

JURISDICTION

The court below entered judgment on August 18, 1980, App. G (156a). On November 6, 1980, Mr. Justice Powell extended the time for filing a petition for certiorari to and including January 15, 1981, App. H (158a), and the petition was filed on that date. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Sections 703(a) (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g); of the Civil Rights Act of 1866, 42 U.S.C. § 1981; and of Rule

52(a), F.R.Civ.Pro., are reprinted in the appendix bound at the back of the petition in No. 80-1193.

STATEMENT OF THE CASE

A. Procedural Overview

Respondents, on behalf of themselves and other black employees at Pullman-Standard's Bessemer, Alabama plant, brought suit against Pullman-Standard ("the Company") and United Steelworkers of America, AFL-CIO-CLC and its Local 1466 (collectively "USW"), alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Only one of respondents' claims is at issue in this Court—their claim that the seniority system maintained by the Company and USW violated these laws.

While litigation of that claim had had a lengthy and somewhat complex history, after this Court's decision in *Teamsters v. United States*, 431 U.S. 324, the challenge to the seniority system boiled down to a single question: was the system adopted or maintained for a discriminatory purpose. The district court, Judge Sam C. Pointer, found "that the system is 'bona fide' and that the differences in terms, conditions or privileges of employment resulting thereunder are 'not the result of an intention to discriminate' because of race or color," and accordingly, pursuant to § 703(h) of Title VII, entered judgment for USW and the Company on this issue (App. 44a).[1] The Fifth Circuit reversed, "because we find" the system to have "resulted from an intent to discriminate because of race" (App. 16a).

The legal issue presented in USW's petition on which this Court has granted certiorari involves the proper al-

---

[1] The petitioners filed separate appendices with their petitions, which are paginated differently. Throughout this brief, references to the various opinions in this case are to the appendix accompanying the Union's petition (No. 80-1193) and are cited as "App. ——." The Joint Appendix is cited as "JA ——."

location of fact-finding functions between district court and court of appeals. To facilitate analysis of that issue, we have chosen to structure our statement of facts in a somewhat unconventional manner. We do not proffer our own version of the facts. Instead, we begin by reciting the facts as found by the district court, detailing in footnotes the record evidence relevant to each of those findings. We then set out the court of appeals' statement of the quite different facts "found" by that court. We comment on the relation of the court of appeals' "findings" to the record evidence in the argument. For the Court's convenience we have also attached to this brief an appendix setting out the four "facts" that the court of appeals declared "significant in our decision" (App. 16a), and a compilation of the district court's findings and of the record evidence that relate to those "facts."

B. The Findings of The District Court and the Relevant Record Evidence

The district court heard, in three trials, 20 days of testimony (JA 5-7, 10, 12)[2] and reviewed a mass of documentary evidence relating to the negotiation and maintenance of the seniority system at issue including "the detailed record of negotiation sessions and contracts which span a period of some thirty-five years" (App. 43a).[3] On the basis of this evidence, the court entered extensive findings of fact detailing the origins of the seniority system and examining the underlying reasons for every aspect of the system challenged by respondents.

---

[2] Excerpts from this testimony are reprinted at JA 31-64, 91-102.

[3] The Company prepared and maintained, for its internal use, minutes of all collective bargaining sessions beginning with the first round of negotiations in 1941. Excerpts from a number of these minutes are reprinted in the Joint Appendix (JA 207-241, 254, 256-258, 261-264, 268, 270-271), together with contract proposals exchanged during the first round of negotiations in 1941 (JA 260, 265-267, 269, 272-278). All of the collective bargaining agreements were introduced into evidence, and excerpts from those in which the seniority system was changed in some respect from the preceding agreement are reprinted in the Joint Appendix (J.A. 167-205).

1. *Background Facts*

Pullman-Standard is the world's largest manufacturer of railway freight cars and parts (App. 118a). At its Bessemer, Alabama plant—the subject of this lawsuit—the Company fabricated railroad cars (*ibid*).[4] The operations at the plant were diverse (App. 31a), with more than one hundred different production and maintenance jobs (App. 119a).[5] Because operations at the plant were performed in response to specific orders for railroad cars, and because the demand for such cars was sporadic, there were frequent and dramatic fluctuations in the level of employment, which ranged from 2,800 employees during peak employment periods to less than 200 at ebb periods (App. 118a and n. 4).[6] Both before and after unionization of the plant in 1941, the plant was divided by the Company into departments for operational purposes (App. 34a-37a).[7]

---

[4] We use the past tense, although the district court did not, because in January, 1981, the Company announced the permanent closing of its Bessemer plant. That closing does not moot this case, in which respondents seek backpay for past events.

[5] The record contains the testimony of the Company's plant manager before the National Labor Relations Board in 1941, during which he described in elaborate detail the manifold operations at the plant and many of the distinct jobs to which employees were assigned (JA 105, 110-143), and the testimony of the assistant plant manager at the 1974 trial herein describing the diversity of operations as of that date (JA 36-40).

[6] The record contains a graph depicting the employment levels by months from 1958 through mid-1974 (JA 90).

[7] The Company's plant manager, testifying before the NLRB in 1941, stated: "[W]e operate by departments . . . . They are all different" (JA 114-115). There were 21 departments immediately prior to the NLRB elections, identified on the voting list used for that election (JA 103). The distinct functions of the various departments were described in the plant manager's testimony to the NLRB (JA 110-143). Changes in departments in succeeding years are reflected in a chart which is reproduced at JA 336.

The USW was elected in 1941 as the bargaining representative of employees in a bargaining unit containing the bulk of the production and maintenance jobs at the Bessemer plant (App. 35a-36a, JA 162).[8]

Although USW had no role in job assignments, and did nothing to "foster" discrimination by the Company (App. 41a),[9] at all times prior to March, 1965, the Company pursued a policy of assigning employees to jobs on the basis of race (App. 54a). Until that date, most jobs were treated by the Company as either "white" jobs or "black" jobs, and were occupied only by persons of that race (*ibid*). In some departments, where all of the jobs were "consigned" to employees of the same race, the result was that as of March, 1965, all of the employees in the department were of the same race (*ibid*). There were eight such departments; five, with a total employee complement of 80, were all-white, and three, with a total complement of 40, were all-black. Collectively they contained a very small percentage of the employees in USW's bargaining unit (less than 7% of the white employees and less than 4% of the black employees). (App. 128a).[10]

---

[8] USW began under the name "Steel Workers Organizing Committee", or "SWOC," and changed its name to "United Steelworkers of America" ("USW") in 1942 (App. 35a, n. 15). As did the district court, for simplicity we refer to the organization both before and after 1942 as "USW" (*ibid*).

[9] Indeed, from 1941 forward USW attempted to end the practice, and ultimately succeeded prior to effective date of Title VII. See *infra*, at 14, n. 27; 15.

[10] The court prepared a chart, from the June, 1965 seniority roster, which shows, *inter alia*, the racial composition of the 25 departments in USW's bargaining unit as of that date. The chart is reproduced at App. 128a. As reflected there, the five all-white departments (Template (9 employees), Powerhouse (4), Inspection (28), Air Brake (27), and Plant Protection (12)) collectively contained 80 employees—less than 7% of the 1173 white employees then in the USW bargaining unit. The three all-black departments

The vast majority of employees (more than 96% of the blacks and 93% of the whites, see n. 10, *supra*) were in racially-mixed departments. That result came about not because pre-1965 job assignments had been color-blind, but rather because the departments contained both "black" and "white" jobs to which employees had been assigned by the Company on the basis of race:

> [E]ven in mixed departments whose racial composition approximated that of the plant as a whole, the assignments were dependent upon whether particular job openings were for a white or black position, rather than a "mixed" one. . . . [T]here was a plant-wide policy of making assignments to departments based on race—not as a policy to segregate departments, but as a means to carry out the plant-wide practice of job segregation. [App. 54a-55a].

The court found—indeed it was not disputed—that the seniority system (which made departmental age the measure of job competition for layoff, recall, and promotion)[11] did not perpetuate the effects of prior job segregation *within* departments:

> There is no claim that the effects of prior discrimination in segregation of jobs within a department are perpetuated by the USW seniority system, for the system allows use of departmental age for promotions without the interposition of lines of progression.
>
> • • • •

(Truck (21 employees), Die & Tool (9), and Janitors (10)) collectively contained 40 employees, less than 4% of the 1151 black employees then in the USW bargaining unit.

[11] From 1941 to 1956, seniority was applicable only to layoffs and recalls (i.e. "in the event of increases and decreases in force"). In 1956, seniority was made applicable to promotions as well. See *infra*, at 14, n.27.

> The major impediment to employment opportunities for blacks—the custom of treating certain jobs as reserved for members of a particular race—was removed prior to the effective date of Title VII by the very instrument here under attack, i.e. the seniority system. That system did not then provide—nor has there been any subsequent effort to erect—barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. [App. 27a, n. 4; 43a].[12]

But the court found that the seniority system perpetuated pre-Act discrimination in job assignments *as between* departments, because it created disincentives to transfer from one department to another (App. 28a), *viz*:

> Employees transferring from one department to another were treated as "new" employees in the department to which transferred (i.e. no carryover of seniority) and, with limited exception for those transferring at the request of the company or electing transfer in lieu of layoff, also lost their seniority in the "old" department. [App. 26a].[13]

Accordingly, the court concluded that, in light of *Teamsters*, the lawfulness of the seniority system depended upon whether or not it was negotiated and maintained with a discriminatory purpose.[14]

---

[12] The method by which the seniority system proved to be the instrument for ending the Company's discrimination in job assignments is described *infra*, pp. 14-15.

[13] JA 194-196. In 1972 the parties, at the behest of the Office of Federal Contract Compliance, acting pursuant to Executive Order 11246, agreed to afford special rights to affected blacks to transfer their accumulated seniority between departments (App. 28a-29a, 123a).

[14] The court ruled (erroneously, we believe, see *infra*, at 30, n.40) that the burden was on the defendants to prove that their seniority system had *not* been negotiated or maintained with discriminatory purpose. "The defendants, as in the nature of an affirmative de-

2. *The District Court's Findings With Respect To The Motivation Of The Seniority System*

The district court found that "the [seniority] system is 'bona fide' and . . . the differences in terms, conditions or privileges of employment thereunder are 'not the result of an intention to discriminate' because of race or color" (App. 44a). The underlying findings upon which that determination was based fell into two categories: (1) findings as to evidence affirmatively showing that the seniority system was *not* discriminatorily motivated; and (2) there being no direct evidence that the system *was* discriminatorily motivated, findings as to the respondents' contentions that such motivation should be inferred from evidence concerning matters other than the negotiation and maintenance of the seniority system.

a. *Findings As To Evidence Affirmatively Showing That The Seniority System Was Not Discriminatorily Motivated*

The court found that in every respect the seniority system was, and always had been, race neutral on its face and "applied equally to all races and ethnic groups" (App. 28a). "To the extent the system 'locks' employees into a department and discourages transfers, it does so equally for both white and black . . ." (App. 28a-29a).

The court found that the system was "essentially a product of USW aims and policies," not those of the Company (App. 40a). The use of departmental age as the measure of seniority was adopted, at the request of USW, in the first round of negotiations—which began in 1941 and concluded in an agreement in early 1942 (App.

---

fense, have the burden to show that the seniority system in question was bona fide and the differences caused thereunder were not the result of any intent to discriminate on the basis of race or color" (App. 25a). The court's ultimate conclusion was that "defendants have met the burden" (App. 44a).

40a).[15] In the 1947 negotiations, at the union's request,[16] the measure of seniority was changed from departmental to "occupation-within-a-department" seniority (App. 40a).[17] In 1954, departmental age was reinstated as the measure of seniority (*ibid.*).[18] Company efforts in subsequent years to broaden the application of seniority by merging certain departments were successfully resisted by the union (App. 40a-41a).[19]

Because USW had thus played the pivotal role in determining the type of seniority system operative at the plant, the court made extensive findings as to USW's attitudes on questions of race and as to the role that black employees had played in determining USW's bargaining position respecting the seniority system.

The court found that at all times USW was committed to "colorblind objectives" and "—unlike most structures and institutions of the era—was not an arm of a segregated society" (App. 41a).[20] The court further found:

---

[15] The seniority provision of USW's first contract is reprinted at JA 180-181. It provides: "No employee shall hold seniority in more than one department . . ." (JA 181). As reflected by a contemporaneous internal Company memorandum, dated Dec. 9, 1941, this language was first proposed by USW (JA 265). The original agreement did not designate departments. With a few exceptions, discussed *infra*, the departments established by the Company for operational purposes prior to unionization were the departments within which seniority was exercised (JA 336).

[16] JA 256.

[17] JA 189 ("Occupational seniority within a department will prevail for all employees other than probationary employees . . .").

[18] JA 194 ("Departmental seniority will prevail for all employees other than probationary employees").

[19] JA 54-61.

[20] These findings are supported not only by the evidence respecting this plant, recounted *infra*, but also by contemporaneous

> One of the few mutual and common ventures of blacks and whites at Pullman's Bessemer plant in 1941 . . . was the unionization effort by the . . . USW. The success of its drive for representation and recognition must be attributed in large part to the black workers, who constituted more than half of the election unit. In 1954, as was true in 1941 and in the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formulation of the policies and positions of the union—the local not being dominated by whites. While possessing some of the trappings taken from an otherwise segregated society, the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation. It cannot be said

---

and later evaluations of USW's performance in general.

Gunnar Myrdal, in his historic work, *An American Dilemma* (1944), said of the Steelworkers:

> This union has been the first which has consistently given real protection to the Negro. [*Id.* at 1117.]

Judge Hatchett, the author of the Court of Appeals opinion below, subsequently said of USW (in a case involving a seniority system negotiated contemporaneously at another plant in Bessemer, Alabama):

> The district court found that the evidence in this case supported the general observation that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." The United Steelworkers of America has a well-known history of striving to achieve racial equality and integration in the labor movement.

Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112, 1121 (5th Cir. 1981). See also, *Whitfield v. United Steelworkers*, 263 F.2d 546, 547-551 (5th Cir. 1959); *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 315, 352-354 (5th Cir. 1977); *United States v. United States Steel Corp.*, 371 F.Supp. 1045, 1055, 1060 n. 39, 1062 (N.D. Ala. 1973), reversed in part on other grounds, 520 F.2d 1043 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976).

> that the union served the cause of segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations. [App. 39a-40a, footnote omitted)].[21]

The Court noted too:

> Blacks, constituting approximately half the work force, have played a major force in the formation

---

[21] Blacks were at the forefront of the USW organizing drive at the Bessemer plant (JA 43-44). At all times the USW Local at this plant had approximately equal numbers of black and white officers and negotiators, and a majority of black shop stewards (JA 44, 52-53, 66-89, 94-96, 208, 212, 218, 222, 228, 230-236, 240, 254, 256, 257, 263, 268, 270). Proposals on seniority, as on all other matters, were debated fully and voted upon at union meetings, with blacks and whites participating equally (JA 54-61, 94-95); indeed, blacks often constituted a majority of those voting (JA 54-61). Voting was by standing vote, and on no occasion did the vote on contract proposals divide along racial lines (JA 96).

Manifesting USW's early commitment to attacking racial discrimination at this plant was its drive, immediately upon certification, to eliminate the disparity in earnings between blacks and whites in the plant. As the Company lamented in a brief to the War Labor Board in 1943, responding to USW's charges of racial discrimination and quest for an elevation of black employees' wages:

> No one ever heard of alleged 'Negro-white' discrimination at this plant until CIO's representative indulged in that suggestion, first in Washington before the War Labor Board in 1941 . . . and again at the time of the negotiation of the contract in 1942, when the alleged mistreatment of Negroes was one of the arguments for a wage increase before the War Labor Board panel. [JA 315-316].

The elimination of these wage disparities remained a union negotiating objective throughout the 1940's (JA 216-220).

The "trappings" to which the district court referred in the quote in text were separate black and white picnics until the early 1950's (JA 91-92); separate washrooms at the local union hall into the 1960's (JA 96-97); and, whether by mandate or personal choice (the record is not clear), blacks and whites sitting on separate sides of the hall during union meetings until the early 1970's (JA 92-94) (just as they did during the trial of this case in a federal courtroom in 1978 (JA 92)).

> and direction of the USW local, occupying positions as officers, committeemen and negotiators [J.A. 34a, n. 14].[22]

Black USW negotiators often played the principal role in determining the direction of the seniority system: for instance, the narrowing of the seniority system in 1947 from departmental seniority to "occupation-within-a-department" seniority was "at the request of a black member of [the] USW negotiating committee" (App. 40a);[23] and the retention of plant protection and janitors as separate departments—a step seen by respondents as "frustrating opportunities for black employees" and hence indicative of racial motivation (App. 37a) —was at the insistence of "a black member of [the] negotiating committee who was a member of the Janitors department," rejecting the suggestion of a white member of the USW negotiating committee that the departments be merged (App. 37a, n. 18).[24] Blacks likewise played a pivotal role at union meetings in speaking and voting against Company proposals to broaden the seniority system by merging departments (App. 34a).[25]

The court found from the foregoing that the seniority system in effect at the Bessemer plant "has been negotiated and maintained by blacks, no less than whites" (App. 43a).

In addition to its examination of USW's motivation, the court "carefully considered the detailed record of negotiation sessions . . . which span a period of some

---

[22] See n. 21, *supra*.

[23] JA 256. The USW negotiating committee which had demanded and won departmental seniority in the original negotiations in 1941-1942 (n. 15, *supra*), consisted of three white and two black union representatives (JA 263, 268, 270).

[24] JA 238.

[25] JA 54-61.

thirty five years" and found that they corroborated its conclusion that "the seniority system between the Company and the USW has been negotiated and maintained free from any discriminatory purpose" (App. 43a).[26]

The court found the events surrounding the extension of seniority to promotions in 1956 to be further evidence that race was not a motivating factor in the seniority system.[27] In making that extension, the parties "did not

---

[26] The minutes of the negotiating meetings were prepared by the Company contemporaneously for its internal use. Not once in any of the discussions of the seniority system during the 35 year period do the minutes reflect any reference to race or racial considerations with the exception of the discussions concerning the granting to blacks of special transfer rights as proposed by the OFCC. This is particularly informative, for in other respects the minutes were replete during the 1940's and 1950's with racial references: the race of USW's black negotiators invariably was noted (see, e.g., JA 208, 212, 222, 254, 256, 263, 268, 270); the race of the spokesmen for particular USW proposals was noted (see, e.g., JA 208, 213, 220-221, 254); the racial identity of pickets during strikes was noted (e.g., JA 209-211, 219, 224-227); and, there were repeated indications that race had been discussed as relevant to particular subjects of negotiations (e.g. USW's request during the 1940's for equalization of black and white wages (JA 216-220)).

[27] While USW did not ultimately secure seniority for promotions until 1956 (App. 26a), the Union had been seeking such a provision from the start. USW's bargaining proposals throughout the 1941-42 negotiations would have made seniority applicable "in all cases of promotion" as well as in "increasing and decreasing the forces" (JA 263-264, 266-267, 272-273). The vast majority of black employees were in integrated departments in 1941 (JA 103), and USW's proposal would have entitled them to use their seniority to promote into the "white" jobs in those departments. The Company's counter-proposals made seniority applicable only "in all cases of increase or decrease of forces" (JA 269, 272), the plant manager insisting upon its proposal as "more applicable to this plant" (JA 271). Similarly, in the 1947 negotiations, the Union's request for seniority for promotions was rejected by the Company on the ground that "such would not work at this plant" (JA 256).

then provide—nor has there been any subsequent effort to erect—barriers to the reaching of one's 'rightful place' as is typically provided by lines of progression" (App. 43a).[28] Indeed, because no such barriers were erected, "this very seniority system . . . provided the means for stopping [the Company's job assignment discrimination] even before the effective date of Title VII" (App. 41a). In March, 1965, an arbitrator ruled that the Company had violated the collective bargaining agreement by denying promotion to blacks who sought to exercise their departmental seniority to claim vacancies in the then all-white Rivet Driver job (App. 27a and n. 3; 121a).[29] Spurred by the arbitration award, the Company abandoned its practice of job segregation (App. 121a-122a).[30]

---

[28] The overwhelming majority of blacks were in integrated departments (see *supra*, at 6-7). In most of these departments blacks as a class had substantially greater departmental seniority than whites. (This can be seen by reviewing P. Ex. 12 (1978 Trial), the 1957 seniority list, with the knowledge that the Company had assigned badge numbers 1-1999 to blacks, and 2000 up to whites.) See, e.g., Maintenance Dept., Railroad Dept. Miscellaneous Stores Dept., Paint and Shipping Track Dept., Press Dept., Punch and Shear Dept., Steel Construction Dept., Steel Erection Dept., Steel Stores Dept., and Wood Erection Dept.

[29] The arbitration award in Un. Exh. 508, introduced at the 1974 Trial, and is in the record before this Court. The Company had assigned riveting work in the Steel Erection Department to three whites who were in the Wood Erection Department, notwithstanding that there were blacks in the Steel Erection Department who desired the work. The union argued, and the arbitrator found, that as the black claimants had departmental seniority in the Steel Erection Department, and the employees awarded the job did not, the Company had violated the seniority provision of the agreement (*id.* at 2).

[30] Blacks began moving into traditionally "white" jobs in substantial numbers following that award (App. 121a-122a, 53a, 55a-56a). As a black employee who was then Vice-President of the Local and later became its President (JA 53) testified, the award "was a ground breaker for the entire plant" (*ibid*).

Respondents had attacked two basic components of the seniority system: first, they claimed that the adoption of departmental service, rather than plant service, as the *measure* of seniority was motivated by a discriminatory purpose; second, they claimed that the departments within which seniority was applied were *shaped* by a discriminatory purpose. The court found that in both respects the decisions made at this plant were rational and conformed to those made throughout the railroad equipment industry, including those made at plants which were virtually all-white and in which race could not have been a determinative factor.

With respect to the choice of departmental seniority rather than plant seniority as the *measure* of seniority, the court found, from record evidence consisting of "publications of the Department of Labor, arbitration awards, decisions of the War Labor Board, various collective bargaining agreements, and contemporaneous studies made by [the Company] at the time of contract negotiations" that "seniority by departmental age such as found at Bessemer was the modal form of agreements generally, as well as with manufacturers of railroad equipment in particular" (App. 33a).[21] Departmental seniority was also used in the Company's other major plant, in Butler, Pa., "where less than 1% of the employees were black" (*ibid.*), and at its plant in Hammond, Ind., "also having a small percentage of black employees" (*ibid.*).[22]

---

[21] The record evidence supporting this finding appears at JA 320-335, 275-285. Department of Labor studies of seniority provisions in collective bargaining agreements concluded that plant-wide seniority systems were "most prevalent in shops in which all employees follow the same craft or in plants where the jobs are more or less interchangeable," while "[i]n larger establishments where operations are more varied, it is common to establish separate lists on departmental lines or according to job specifications" (JA 325; see also JA 326-327). The plant in this case, of course, was large and had a diversity of operations (see p. 5, *supra*).

[22] JA 206, 317-319 (Butler); JA 242 (Hammond).

With respect to the *shape* of the departments, the court looked for two possible indicators of racial gerrymandering: whether the *number* of departments was abnormally large when compared to comparable plants in the industry, and whether the *configuration* of the departments was irrational and/or different from other plants in the industry. In both respects, the court found the system at this plant to be rational and consistent with those throughout the industry, including at plants where the workforce was virtually all white.

Regarding the *number* of departments (28 in 1954, including 26 in USW's bargaining unit and two in a unit represented by IAM, with no change in subsequent years except that one department in USW's unit became vacant (App. 31a)), the court found as follows:

> While this at first glance appears to be an unusually large number of departments, it must be viewed in the context of the diversity of operations at the plant, the extreme fluctuations in employment levels, and—what is particularly significant—the opportunity to use seniority within the unit for any job without the barrier of any lines of promotion. Given these facts, the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumpings or displacements, highly inefficient performance, or excessive grievances over ability factors—or all of them.
>
> • • • •
>
> The number of separate departments found at Pullman's Bessemer plant is less than (40 departments) at American Car and Foundry's plant at St. Charles, Missouri, and than that (29 departments) at Eastern Car Company's plant in Nova Scotia. The same number of departments (28) are found at Pullman's plant in Butler, where less than 1% of the employees were black; and the lesser number of departments found at Pullman's plant in Hammond, also having a small percentage of black

employees, should be viewed in the light of the more limited operations there conducted.[10]

[10] The Hammond plant does not build cars. It only provides repair services and produces certain parts and components. [App. 31a, 33a; some footnotes omitted].[33]

Regarding the *configuration* of the departments, the court found that there was a rational explanation for each of the choices that had been made (App. 31a-38a). For example the court noted:

> [T]he . . . creation of a separate Inspection department in the late 1940's, drawing the inspectors from the various operating departments into a separate unit . . . was certainly rational—removing them from responsibility to the very persons whose production they were called upon to inspect. [App. 32a]

Moreover, the configurations were "consistent with practices at other unionized plants throughout the country, at other companies in the same industry, and indeed at Pullman plants located outside the South where race was presumably not a potential consideration" (App. 32a).[34] In particular, the court found that in each instance an identical configuration existed "at either the Hammond or Butler plants, or both" (App. 37a).[35] The court ultimately concluded on this subject:

> While it is appropriate to view, as this court has done, the systems under a microscope, the ultimate objective is to comprehend the gestalt of the system. Here, from either perspective, the court finds the departmentalization at Pullman to be rational, in accord with the industry practice, and consistent with NLRB policies. [App. 37a-38a].

[33] See JA 329-330, 305-312, 206, 317-319, 242.

[34] The court had before it evidence respecting the departmental structures of numerous plants in the railroad equipment industry. See, e.g. JA 242, 305-312, 317-319, 329-330, 332-333.

[35] The departmental configurations at the Butler plant appear at JA 317-319, 206, and at the Hammond plant at JA 242.

b. *Findings As To Respondents' Contentions That Discriminatory Motivation Should Be Inferred From Evidence Concerning Matters Other Than The Seniority System*

In the face of the affirmative evidence of innocent motivation recounted above, and lacking any direct evidence that the seniority system had been discriminatorily motivated, respondents asked the court to infer discriminatory motivation from certain other evidence.

First, respondents pointed to the fact that the seniority system had been adopted at a time when the Company engaged in overt racial discrimination with respect to many employment practices, including job assignments. Respondents contended that an inference should be drawn that the animus prompting these other forms of discrimination also had influenced the construction of the seniority system. The court recognized that absent explanation such an inference could be drawn from "the apparent pervasiveness of such [other] discrimination" (App. 39a), but declined to do so here because the evidence showed that the seniority system was the product of USW's aims and policies, not the Company's; USW's policies were "colorblind", and blacks had had an equal voice with whites in determining the form of the seniority system—a subject on which employees had not divided along racial lines (App. 39a-41a; see pp. 9-13, *supra*).

Second, respondents argued that blacks as a class were disproportionately assigned to the less desirable departments, that the opportunity to carry seniority from one department to another would have meant more to blacks than to whites, and, consequently, despite the system's facial neutrality, discriminatory purpose should be inferred from the fact that the system did not provide for carryover of seniority upon transferring from one department to another. The court concluded that the inference was not warranted, explaining:

> Such an analysis may, indeed, be useful in the process of evaluating circumstantial evidence. If, to take an extreme example, a seniority rule were shown to penalize all blacks and no whites, the inference that the rule was racially motivated would seem compelled. Where, however, as here, a rule affects significant numbers of both white and black employees—and does so in an identical manner—it would be a misreading of *Teamsters*, in this court's view, to determine "neutrality" on the basis of its quantitative effects. [App. 29a].[26]

Third, respondents contended that the court should infer discriminatory motivation in USW's seniority system from the facts surrounding the creation immediately following unionization of two separate Die & Tool Departments and two separate Maintenance Departments, where prior to unionization there had been only one of each department. The court found such an inference unwarranted. The court began by describing the circumstances which led to the splitting of these departments:

> The existence of these divided departments is due to actions of the NLRB in 1941, when it—at the request of other petitioning unions—divided the plant into three representational units for election purposes. This was done over the opposition . . . of the USW, which sought to represent all production and maintenance employees. The company properly adopted a "hands-off" attitude on formulation

---

[26] On this point, the Court noted that assessing the relative effect of the rule upon whites and blacks would require "ranking the . . . departments according to some perceived order of desirability," a process which, on the facts of this case, might or might not reflect a disparate effect upon blacks depending upon the assumptions used to determine the relative desirability of departments (App. 29a-30a). The court noted that in an earlier opinion in this case it had found, using various sets of such assumptions, that blacks were not disadvantaged vis-a-vis whites in their departmental assignments (App. 30a, 127a-130a).

of election units. Three separate election units were formed by the NLRB, with the International Brotherhood of Electrical Workers gaining representation status (over the USW) for two small departments, with the IAM gaining representation (over the USW) for five other departments, and with the USW gaining representation (over the Federal Labor Union) for the bulk of the employees. The unit formed by the NLRB as to which the IAM gained recognition was one which included certain positions in the Die & Tool and Maintenance departments considered by the NLRB as involving craft and craft-related jobs, but which omitted other positions in those departments, they being in the unit for which the USW gained recognition. Hence—and it is difficult to understand how the company and the USW could have legally done otherwise—it resulted that there were two Die & Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union. The separation into different bargaining units was not merely, as in Teamsters, "consistent with National Labor Relations Board precedents," 431 U.S. at 356, 14 FEP Cases at 1527; it was rather required by a specific decision of the NLRB and the outcome of the elections. [App. 35a-36a; footnote omitted].[37]

---

[37] USW, in 1941, filed a petition with the NLRB seeking certification as the exclusive bargaining representative "of all production and maintenance employees, exclusive of foremen, superintendents and clerical forces" (JA 288). Two craft unions—the International Brotherhood of Electrical Workers ("IBEW") and the International Association of Machinists ("IAM")—intervened, seeking separate NLRB elections in units of the craft and craft-related employees within their respective jurisdictions (JA 107-109, 155). The battle-lines were thus drawn "between the newly-formed CIO [of which USW was part], with its strategy of heterogeneous, plant-wide industrial organization, and the older AFL, with its traditional approach of organizing separate homogeneous craft unions." *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1116 (5th Cir. 1981). USW urged the NLRB *not* to conduct

USW and IAM negotiated separate collective bargaining agreements with the Company for their respective bargaining units, containing separate (and different) seniority systems (J.A. 167-169, 180-181). The court was unwilling to infer that discriminatory motive was the explanation for the unions' confining their respective seniority systems to the employees in their respective bargaining units:

> If there was any industry practice to combine positions represented by different unions into the same seniority unit, this court was certainly not presented with evidence to that effect. [App. 37a].

Fourth, respondents argued that discriminatory motivation in USW's seniority system should be inferred because in two successive transfers, in 1941-1942 and in 1944, USW took into its bargaining unit most of the jobs that the NLRB originally had certified in the IAM unit, leaving IAM only with two all-white departments. Respondents contended that IAM was motivated in ceding these jobs by a desire to rid its unit of black em-

---

separate craft elections (JA 107, 291-293), while the Company took no position (JA 155). A lengthy NLRB hearing ensued (JA 105-149), at the conclusion of which the NLRB, finding that "many of the employees in the separate units urged by the I.B.E.W. and the I.A.M. are skilled employees, and all of such employees appear to come under the craft jurisdiction of these two unions" (JA 155) ordered three separate elections: one "among the employees . . . claimed by the I.B.E.W. to constitute an appropriate unit" (JA 156), one "among the employees . . . claimed by the I.A.M. to constitute an approprate unit" (*ibid.*), and the third among "all production and maintenance employees . . . excluding . . . employees in groups 1 and 2 above" (J.A. 160). IBEW won the election in the first unit, containing 22 employees (JA 161-162), IAM won in the second unit, containing 163 employees (JA 162), and USW won the third, containing 987 employees (*ibid*). The unit for which the IAM was certified included some, but not all, of the employees in the Maintenance and Die & Tool Departments (JA 165-166).

ployees, and that USW agreed to take the jobs to facilitate that objective of IAM.

The court, noting that this suit challenges only the USW seniority system, and not IAM's (App. 35a, 42a),[28] was unwilling to infer from the record evidence respecting these transactions that the USW seniority system was discriminatorily motivated:

> Plaintiffs view the evidence as showing that the IAM never wanted to represent any black employees and that, by a series of maneuvers including agreements with the NLRB and later a partial ceding of members, it was able to eliminate blacks from its membership, a matter which continued until passage of Title VII. While the objective facts are not greatly

---

[28] The original complaint herein did not even name IAM as a defendant (JA 2, 29). On the eve of trial, plaintiffs sought and obtained leave to amend their complaint to add IAM as a Rule 19 defendant "insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company" (JA 29). The amended complaint added IAM as a defendant to facilitate "complete relief" (JA 21), but continued to allege only that USW's seniority system (and not IAM's) was unlawful:

> "All matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs and the class they represent have been, at all material times to this action, governed and controlled by collective bargaining agreements entered into between the International Union, United Steelworkers, and the Company and/or local supplemental agreements (hereinafter referred to as "agreements") entered into between Local 1466 [of USW] and the Company. *Under and pursuant to the terms of the aforementioned agreements*, the defendants have established a promotional and seniority system, the design, intent and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the defendants' policy, practice, custom and usage of limiting the employment and promotional opportunity of Negro employees of the Company because of race or color. [JA 20-21; emphasis added]

in dispute, the defendants here do challenge the characterization of the IAM motives, asserting that the changes took place because of initial confusion over which craft and craft-related positions should be properly represented by the IAM and because of subsequent loss of support of the IAM by many of its members.

Whatever the motives of the IAM in the 1941-42 period—the court finds it unnecessary to resolve this factual dispute—the USW cannot be charged with racial bias in its response to the IAM situation. The predecessor of the USW sought to represent all workers, black and white, in the plant. It accepted additional workers of both races into its local after the election, when that opportunity presented itself. Its concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because ti viewed them as scabs who had not honored picket lines. * * *

The effort of the plaintiffs to fix responsibility on the company for whatever racial discrimination may have existed in the IAM is likewise without merit. The company properly took a "hands-off" approach towards the establishment of the election units and the subsequent modifications of the representational units. It bargained with those unions which were afforded representational status by the NLRB, and did so without any discriminatory animus. [J.A. 41a-43a][39]

---

[39] With regard to this finding we note the following evidence:

(1) No IAM representative ever participated in the negotiation or administration of USW's seniority system; only representatives of the Company and USW participated therein (JA 208, 212, 218, 222, 228, 230, 232-236, 239-240, 254, 256-257, 263, 268, 270). The IAM negotiated separately, with only IAM and Company representatives present (JA 261-262).

(2) Immediately after the NLRB announced its decision to create three separate bargaining units, USW moved for rehearing, contending, *inter alia*, that the IAM unit defined by the NLRB in-

Fifth, respondents asked the court to infer discriminatory motivation in USW's seniority system from the

---

cluded "employees who have never heretofore been classed as machinists" and who "work in many diversified and unrelated types of work and are spread in small groups all over the company's plant and have very little in common either from the standpoint of similarity of tasks, rates of pay or degree of skill" (JA 292). After the NLRB elections, and in light of continuing disputes, the NLRB requested that USW and IAM meet in an attempt to agree upon corrected unit definitions (JA 170). The outgrowth of that meeting was an agreement by IAM to cede to USW those employees who were not craftsmen or skilled assistants to craftsmen (JA 170-171). The NLRB thereupon made repeated attempts to secure the Company's acceptance of the transfer of jobs between bargaining units (JA 294). The Company, having determined that so far as the Company's interests were concerned "it doesn't seem . . . to make much difference" which bargaining unit the jobs were in (JA 294), accepted the agreement "[a]ssuming that [it] is satisfactory to the Board, and subject to Board orders" (JA 171). The contraction of the IAM unit to craft and highly skilled jobs resulted in the transfer of a number of blacks (respondents estimate 24, Brief in Opp., p. 7, n.7) from the IAM unit to the USW unit, the Company's assignment discrimination having prevented blacks from securing highly-skilled jobs.

(3) In 1944, USW sought an NLRB election to capture from IAM what was left of the IAM unit. On the eve of the NLRB hearing on USW's petition, a compromise was reached: IAM ceded three of the five departments whose employees it represented to USW, retaining the employees in two departments (App. 36a, 42a; JA 174-176, 336-338; compare JA 172 with JA 177). The basis for this compromise was described by the man who was then the President of the USW Local (JA 337-338). USW told IAM "we are going to take who we want, not what you want to give us" and, regarding the employees in the two departments left to IAM, "I said we didn't want them scabbing son-of-a-bitches, they come across our picket line" (JA 338). The 1944 compromise transferred approximately two-third of the employees formerly in the IAM unit (about 100 out of 150) to the USW unit, including all four blacks who were then in the IAM unit (JA 255).

(4) By these successive actions, and the subsequent acquisition in 1946 of the jobs which the NLRB had certified originally to the IBEW (App. 41a, JA 298-304), USW had by 1946 expanded its bargaining unit to include all employees in the plant except "them scabbing son-of-a-bitches" in the IAM unit.

particular choices that USW and the Company had made in structuring certain departments. As described above, pp. 17-18, the court found in each of these instances that the choice was rational and consistent with practices elsewhere in the industry and concluded that there was no basis for inferring discriminatory motivation.

C. The Court of Appeals' Opinion

The court of appeals reversed the district court's ruling that the USW seniority system was a *bona fide* system protected by § 703(h). Citing the controlling rule in the Fifth Circuit—that because "a finding of discrimination is a finding of ultimate fact . . . we will proceed to make an independent determination, though bound by findings of subsidiary fact which are themselves not clearly erroneous" (App. 15a, n. 6)—the court of appeals premised that reversal on its own "find[ing]" that the system "resulted from an intent to discriminate because of race" (App. 16a). In that court's view: "It is crystal clear that considerations of race permeated the negotiation and adoption of the seniority system in 1941 and subsequent re-negotiation thereafter" (App. 14a). That court explained its finding as follows:

> The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.
>
> The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant re-

mains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U.S.W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and re-negotiation of the system, and the extent to which the system and the attendant no-tranfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703 (h) of Title VII, 42 U.S.C. § 2000e-2(h). [App. 15a-16a.]

SUMMARY OF ARGUMENT

It is settled under Title VII that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." The decisive question posed by the plaintiffs' challenge to the seniority system here is whether the requisite "discriminatory purpose" has been proved. The district court answered that question in the negative. The court of appeals, following the rule of the Fifth Circuit that a revewing court may "reverse [a finding of the absence of discriminatory purpose] free of the clearly erroneous rule," reversed the finding of the district court, substituting its own finding that the system was motivated by a discriminatory purpose.

A.

The expansive appellate review indulged in by the court below exceeds that permitted by Rule 52(a), F. R. Civ. Pro. Reliance on the fact findings of the trial courts "is required . . . by the essential nature of trial courts as distinguished from appellate courts." It is thus basic that under the federal rules of procedure the appropriate scope of review depends on whether the appellant claims that the district court misunderstood the *law's* requirements or whether the claim is that the district court's *factual* determinations are inaccurate. The determination that the parties to a seniority system acted with the "discriminatory purpose" made unlawful by § 703(h) requires, first, a determination of what "discriminatory purpose" means in this context as a matter of law, and, second, a determination whether on the facts of the particular case the parties had acted with a "discriminatory purpose" as thus defined. The statement that a determination of "discriminatory purpose" under § 703(h) is solely one of law is incorrect as is the statement that the determination is solely one of fact. The analysis of the meaning of a standard like "discriminatory purpose" is one of law, and if that analysis is properly done the conclusion as to whether the particular defendants before the court acted with that purpose is one of fact.

In the instant case, the court of appeals did not proceed on the theory that the district court misunderstood the meaning of § 703(h). Rather, the issue as to which the district court and the court of appeals reached contrary conclusions was: were the parties who established and maintained the seniority system at Pullman's Bessemer Plant motivated in so doing by a discriminatory purpose. That issue *is* solely one of fact; it is of precisely the same nature as the question in *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535, which this Court

stated was subject to review under the clearly erroneous standard.

B.

The instant case is a paradigm of the potential inherent in the process of *de novo* appellate fact-finding for creating rather than correcting error. Where the Fifth Circuit and the district judge disagreed, the court of appeals: ignored district court findings that are supported by substantial evidence; made findings of fact that are not supported by any evidence or are supported by less substantial evidence than that relied on by the district judge; and drew inferences that are less rational in the context of the entire record than those drawn by the district judge. The precise office of Rule 52(a) is to prevent the courts of appeals from supplanting careful, conscientious, and considered district court evaluations of the evidence with independent appellate findings of fact. The court of appeals' hopelessly flawed findings here attest to the wisdom of that rule—if such attestation be needed.

Because on this record the finding of "discriminatory purpose" made by the district court could not be upset as clearly erroneous, the appropriate disposition of this case at this point is to reverse the decision of the court below and to remand the case with an instruction to affirm the judgment of the district court that the seniority system does not violate Title VII.

ARGUMENT

It is settled under Title VII that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82; see also *Teamsters v. United States*, 431 U.S. 324, 352. The decisive question posed by the plaintiffs' challenge to the seniority system here is whether the requisite "dis-

criminatory purpose" has been proved.[46] The district court answered that question in the negative, the court of appeals in the affirmative. The latter's decision was arrived at through application of the well-settled approach of the Fifth Circuit to the scope of appellate review in Title VII cases:

> With respect to ultimate findings of fact, we noted in *Industrial Instrument Corp. v. Foxboro Co., supra*, 307 F.2d at 786 n. 2:
>
> > We may reverse free of the clearly erroneous rule where . . . the issue revolves around an ultimate fact question as distinguished from subsidiary fact questions. . . .

---

[46] The district court in this case, believing that § 703(h) creates an "affirmative defense," held that defendants had the burden of proving its applicability (App. 25a). While it makes no difference to the outcome of this case, this Court's decisions establish that the burden is on plaintiffs to prove discriminatory purpose, and not on defendants to prove its absence. In *TWA v. Hardison, supra*, 432 U.S. at 83 n. 13, the Court said:

> Here . . . the operation of the seniority system itself is said to violate Title VII. In such circumstances, § 703(h) unequivocally mandates that *there is no statutory violation in the absence of a showing of discriminatory purpose.* [Emphasis added].

See also *United Airlines Inc. v. Evans*, 431 U.S. 553, 558-560; *California Brewers Assn. v. Bryant*, 444 U.S. 598, 610-611.

These rulings follow from the Court's prior holding that § 703(h) is "only a definitional provision"; it "delineates which employment practices are illegal and thereby prohibited and which are not." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758. See also *id.* at 761; *Teamsters*, 431 U.S. at 346-347. By "defining" that only seniority systems established or maintained with a discriminatory purpose are illegal, § 703(h) "defines" the violation which it is plaintiffs' burden to prove. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *Texas Department of Community Affairs v. Burdine*, —— U.S. ——, 49 L.W. 4214, 4216 (March 4, 1981).

See also *Galena Oaks Corp. v. Scofield, supra*, 218 F.2d at 219.

Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. See *Hester v. Southern Railway Co.*, 5 Cir., 1974, 497 F.2d 1374, 1381; *United States v. Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 423-24. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous. [*East v. Romine, Inc.*, 518 F.2d 332, 339 (CA 5, 1975), cited for this point and quoted in the decision below at App. 15a, n. 6].[41]

---

[41] In addition to *East* and the instant case, the Fifth Circuit has invoked its "free[dom]" from Rule 52(a) in reviewing, and in almost every case overturning, district court findings of the absence of discriminatory purpose in, *e.g.*, *Causey v. Ford Motor Co.*, 516 F.2d 416 (CA 5, 1975); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (CA 5, 1978), *cert. denied*, 441 U.S. 968 (1979); *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 690 (CA 5, 1979); *Burdine v. Texas Dept. of Community Affairs*, 608 F.2d 563 (CA 5, 1979), *reversed on other grounds*, —— U.S. ——, 49 L.W. 4214 (1980); *Crawford v. Western Electric Co.*, 614 F.2d 1300 (CA 5, 1980); *Thompson v. Leland Police Dept.*, 633 F.2d 1111, 1112 (CA 5, 1980); *Danner v. United States Civil Serv. Comm'n*, 635 F.2d 427, 430-431 (CA 5, 1981); *Phillips v. Joint Legislative Com.*, 637 F.2d 1014, 1024 (CA 5, 1981). Our research has disclosed no instance in which the Fifth Circuit invoked this broad scope of review in reviewing a district court finding of the *existence* of a discriminatory purpose.

Only one circuit has followed the lead of the Fifth Circuit in holding that Rule 52(a)'s "clearly erroneous" standard is not applicable in reviewing district court findings respecting discriminatory purpose. *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (CA 7, 1976), *cert. denied*, 433 U.S. 919. Two circuits have expressly disapproved the Fifth Circuit's rule, concluding that Rule 52(a) *does*

Thus, the court below made an "independent determination' of the "ultimate fact" of "discriminatory purpose," and substituted its finding regarding what had motivated the parties to the seniority system for the opposite one made by an experienced district court judge, who had lived with the case for eight years, had heard weeks of testimony, had reviewed hundreds of exhibits, had set forth detailed findings of fact which in every instance were, as we have shown pp. 4-26, supported by substantial evidence, and had on these bases made a careful evaluation of whether the seniority system had in fact been motivated by a discriminatory purpose.

As we now show, the expansive appellate review indulged in by the court below exceeds that permitted by Rule 52(a), F. R. Civ. Pro., which provides in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

---

control findings of discriminatory purpose. *Sweeney v. Bd. of Trustees of Keene State College*, 604 F.2d 106, 109 n.2 (CA 1, 1979), *cert. denied*, 444 U.S. 1045; *Kunda v. Muhlenburg College*, 621 F.2d 532, 544 (CA 3, 1980) (citing *Sweeney*). And the remainder of the circuits have applied Rule 52(a)'s clearly erroneous standard and not the Fifth Circuit's contrary standard. *Bostic v. Boorstin*, 617 F.2d 871, 875 n.18 (CA DC, 1980); *Duckett v. Silberman*, 568 F.2d 1020, 1023 (CA 2, 1978); *EEOC v. Chesapeake & O. Ry.*, 577 F.2d 229, 233 (CA 4, 1978); *Smith v. South Central Bell Telephone Co.*, 518 F.2d 68, 69 (CA 6, 1975); *Kendrick v. Comm. of Zoological Subdistrict*, 565 F.2d 524, 526-527 (CA 8, 1977); *Garval v. Arthur G. McKee*, —— F.2d ——, 25 FEP Cases 1565, 1567 (CA 9, 1981); *Silberhorn v. General Iron Works Co.*, 584 F.2d 970, 971 (CA 10, 1978).

A.

1. The Advisory Committee on the original federal procedural rules noted:

> The rule stated in the third sentence of *Subdivision* (*a*) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. [5A Moore's Federal Practice, ¶ 52.01 [2], p. 2605]

This reliance on the fact findings of the trial courts "is required . . . by the essential nature of trial courts as distinguished from appellate courts." 9 Wright and Miller, Federal Practice and Procedure, § 2587, p. 748. The trial judge has a superior opportunity to learn the record in minute particularity, to view the disputants, to understand a complex case in its entirety, and to place the various aspects of the matter in proper perspective. He is the one immersed in the case over a substantial period of time. The appellate judge in contrast is presented with only discrete elements of the controversy which are distilled through presentation in briefs subject to page limitations and in a short period of oral argument. Moreover, as Wright and Miller emphasize:

> Even in instances where an appellate court is in as good a position to decide as the trial court, it should not disregard the trial court's finding, for to do so impairs confidence in the trial courts and multiplies appeals with attendant expense and delay. The matter was clearly stated by Judge John B. Sanborn for the Eighth Circuit:
>
> > The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The

> existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.
>
> • • • •
>
> [T]he Ninth Circuit in 1962 in the case of Lundgren v. Freeman . . . said:
>
> • • • •
>
> Nothing in the history of review of equity cases or of law cases tried without a jury suggests that the appellate court ever decides issues of fact in the first instance, even where it considers itself as fully qualified as the trial judge to do so. Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court. [*Id.* at pp. 748-749.]

This Court's words in *United States v. Real Estate Boards*, 339 U.S. 485, 495-496, are in point here:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States v. Yellow Cab Co.*, 338 U.S. 338, 342; *United States v. Gypsum Co.*, 333 U.S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous."

2. The question whether a "discriminatory purpose" has been proved under § 703(h) of Title VII, like any question whether a component of a legal claim has been proved, involves an element of law and an element of fact.

In reviewing whether a "conspiracy in restraint of trade" under the Sherman Act had been proved, this Court, in the oft-cited case of *United States v. Gypsum Co.*, 333 U.S. 364, 394, explained:

> In so far as [the District Court's] Finding 118 [that no conspiracy in restraint of trade had been proved] and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit*, errors of law occurred. These we can, of course, correct. In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, theretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The insight of the *Gypsum* opinion was given added content in a later antitrust conspiracy case, *United States v. Parke Davis & Co.*, 362 U.S. 29, 43-44:

> The District Court in this case apparently assumed that the Government could prevail only by establishing a contractual arrangement, albeit implied, between Parke Davis and its customers. Proceeding from the same premise Parke Davis strenuously urges that Rule 52 of the Rules of Civil Procedure compels an affirmance of the District Court since under that Rule the finding that there were no contractual arrangements should "not be set aside unless clearly erroneous." But Rule 52 has no application here. The District Court premised its ultimate finding that Parke Davis did not violate the Sherman Act on an erroneous interpretation of the standard to be applied. . . . [W]hether an unlawful combina-

> tion or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. See *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, 612. Because of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts.

It is thus basic that under the federal rules of procedure the appropriate scope of review depends on "the nature of the District Court's [asserted] error": on whether the appellant claims that the district court misunderstood the law's requirements or whether the claim is that the district court's factual determinations are inaccurate. In jury trials, of course, questions of law and questions of fact are separated and delegated respectively to the judge and to the jury, and no apeal lies to review the findings made by the latter body. In non-jury trials, the same separation between the legal and factual elements of the claim must be made for purposes of determining the appropriate scope of appellate review. This parallel was expressly recognized in *Commissioner v. Duberstein*, 363 U.S. 278, 291:

> Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker v. Texas & Pacific R. Co., supra*, at 228. Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed. Rules Civ. Proc., 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395. The rule itself applies also to factual inferences from undisputed basic facts, *id.*, at 394, ...

Given these principles, the determination that the parties to a seniority system acted with the "discriminatory purpose" made unlawful by § 703(h) requires, first, a determination of what "discriminatory purpose" means in this context as a matter of law, and, second, a determination whether on the facts of the particular case the parties had acted with a "discriminatory purpose" as thus defined. The statement that a determination of "discriminatory purpose" under § 703(h) is solely one of law is incorrect as is the statement that the determination is solely one of fact. The analysis of the meaning of a standard like "discriminatory purpose" is one of law, and if that analysis is properly done the conclusion as to whether the particular defendant before the court acted with that purpose is one of fact. Thus, in *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535, in the context of a claim of discrimination in violation of the Fourteenth Amendment, this Court recognized that the question whether a particular defendant has taken certain actions with an intent to discriminate is one of fact, reviewable under the clearly erroneous standard:

> The Court of Appeals expresaly held that, "at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment," and that the "finding of the district court to the contrary is clearly erroneous." 583 F.2d, at 247 (footnote omitted). On the record before us, we perceive no basis for petitioners' challenge to this holding of the Courtof Appeals.[8]

---

[8] We have no quarrel with our Brother STEWART'S general conclusion that there is great value in appellate courts showing deference to the fact-finding of local trial judges. *Ante*, at 470-471. The clearly erroneous standard serves that purpose well.[42]

---

[42] See also, e.g., *United States v. Oregon Med. Soc.*, 343 U.S. 326, 330-332 (review of finding on existence of antitrust conspiracy gov-

In the instant case, the court of appeals did not proceed on the theory that the district court misunderstood the meaning of § 703(h). Rather, the issue as to which the district court and the court of appeals reached contrary conclusions was: were the parties who established and maintained the seniority system at Pullman's Bessemer Plant motiviated in so doing by a discriminatory purpose. That issue *is* solely one of fact; it is of precisely the same nature as the question in *Dayton* which this Court stated was subject to review under the clearly erroneous standard.

B.

The instant case is a paradigm of the potential inherent in the process of *de novo* appellate fact-finding for creating rather than correcting error. As we now show, where the Fifth Circuit and the district judge disagreed, the court of appeals: ignored district court findings that are supported by substantial evidence; made findings of fact that are not supported by any evidence or are supported by less substantial evidence than that relied on by the district judge; and drew inferences that are less rational in the context of the entire record than those drawn by the district judge.

---

erned by Rule 52); *McAllister v. United States*, 348 U.S. 19, 20-23 (review of finding on negligence governed by Rule 52); *United States v. duPont & Co.*, 351 U.S. 377, 381 (review of finding on monopolization governed by Rule 52); *Pearifoy v. Commissioner*, 358 U.S. 59, 60-61 (review of finding on whether employment is temporary or indefinite governed by Rule 52); *Guzman v. Pichirilo*, 369 U.S. 698, 702-703 (review of finding on whether a ship is under a demise charter governed by Rule 52); *Wright v. Rockefeller*, 376 U.S. 52, 56-58 (review of finding on motive in drawing district lines governed by Rule 52); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123 (review of finding of damage from an antitrust violation governed by Rule 52); *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 75-77 (review of finding on whether a plant would be completed governed by Rule 52).

Normally, the findings of fact of the district court mark the starting point for analysis under the clearly erroneous standard. In this case, the core "subsidiary" findings of the district court that led that court to find no discriminatory purpose may be summarized as follows:

(1) In every respect the seniority system was, and always had been, race-neutral on its face and "applied equally to all races and ethnic groups. . . . To the extent the system 'locks' employees into a department and discourages transfers, it does so equally for both white and black. . . ." See *supra* at 9.

(2) The system was the "product" of the "aims and policies" of a union in which blacks have always played a major role. In every round of negotiations, black employees and white employees participated in equal or virtually equal numbers on the union negotiating committee, and black employees were critical participants in every decision from the institution of the system through each modification of an aspect of the system. The system "has been negotiated and maintained by blacks, no less than whites." See *supra* at 9-13.

(3) The detailed contemporaneous minutes of the negotiations concerning the establishment of the seniority system and its modification from time to time contained no indication that there was any intent to discriminate on the basis of race. See *supra* at 13-14.

(4) At the time the measure of seniority (departmental age) used in the system was adopted, that measure was the "modal" choice in industrial agreements generally and in the railroad equipment manufacturing industry in particular, including in agreements at plants in the railroad equipment industry that were virtually all-white. See *supra* at 16.

(5) The separation of the plant into departments had occurred prior to unionization, the departments having been established by the Company for operational purposes. A few changes were made in these departmental configurations upon and subsequent to unionization; each such change was rational—a number having resulted from the bargaining unit determinations made by the NLRB—and not based upon racial considerations. See *supra* at 5, 17-18, 20-22.

(6) With the exception of the splitting of certain departments as a result of the NLRB's determination to establish three separate bargaining units, represented by three different unions, the departmental configurations as they finally evolved were fully in accord with industry practice, including the practice at plants that were virtually all-white. See *supra* at 16-18, 20-22.

None of these findings was found by the court of appeals to be clearly erroneous. And, as set forth *supra* at 4-26, each of these findings was supported by substantial record evidence.

The court of appeals' discussion of the motivation of the seniority system is composed of two parts. That court began by restating the district court's findings, interspersing the narrative with observations and qualifications of its own (App. 10a-14a). Then the court below stated its "finding" of "discriminatory purpose" and in three paragraphs explained its basis for that "finding". App. 15a-16a set out at pp. 26-27, *supra*. That explanation does not advert to, much less refute, the district court's core findings just restated as numbers 2 and 3 and 4.[43]

---

[43] The court of appeals recited the essence of finding 2 earlier in its opinion (App. 13a) but made no mention of that finding in its analysis. A significance of of that finding, *inter alia*, is that it defeats any inference respecting the motivation of the seniority system that could be drawn from the fact that at the time the

With regard to finding 1, the court of appeals did not dispute that the system was race-neutral on its face and applied equally to blacks and whites, but stated that the effect of the system was to "lock[ ] blacks into the least remunerative positions within the company" (App. 16a).[44]

---

system was established the Company was engaged in other forms of discriminatory conduct. We note that in any event there would be a serious question whether the motivation of a seniority system may be established by reference to other employment practices of the employer or union. Because a facially neutral seniority system is vulnerable to attack under Title VII only when it perpetuates prior discrimination, the question of the motivation of the seniority system only arises when the employer has engaged in assignment discrimination. If the fact of such other discrimination were a basis for an inference that the seniority system was discriminatorily motivated, the Congressional purpose which this Court found manifested in § 703(h)—that a neutral seniority system should not be invalidated on the ground of such discrimination (see *Teamsters*, 431 U.S. at 349-355)—could be defeated in every case.

It should be mentioned too that the court of appeals in addition to not disputing finding 4 failed even to suggest any evidence that might have cast doubt on the motivation behind the adoption of departmental age as the system's measure of seniority. The whole thrust of the court of appeals' analysis of the evidence concerns the motivation behind the adoption of certain departmental configurations. Therefore, even were the court of appeals otherwise correct, its analysis would lead only to finding those departmental configurations in violation of Title VII, not to invalidating the entire seniority system including the use of departmental age as the seniority measure. Yet the latter is what the court of appeals did. See App. 16a, 22a.

[44] We put aside here this Court's holding in *Teamsters* that such an effect does not render a seniority system invalid:

> In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judg-

The record, however, does not support the court of appeals' "finding" that the system had such an effect. It is undisputed, as we have noted, that until 1965 the Company did assign employees to particular jobs on a discriminatory basis.[45] But, as the district court found, for the vast majority of black employees who had been discriminatorily assigned the seniority system provided both the means to end that discrimination and the means to reach "one's 'rightful place'." See *supra*, 7-8. As of 1965, 96% of the black employees and 93% of the white employees were in integrated departments. See *supra*, 7. To the extent blacks had previously been assigned to inferior jobs within those departments, the system gave them the right to use their seniority in the department to compete without restriction for any job in the department. As the district court found:

> The major impediment to employment opportunities for blacks . . . was removed prior to the effective date of Title VII by the very instrument under attack here, i.e., the seniority system. That system did not provide . . . barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. [App. 43a]

---

ment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. [431 U.S. at 352-353; see also 431 U.S. at 349-350, 353-354]

[45] The court of appeals twice asserted that "the first U.S.W. contract . . . excluded blacks from the better jobs" (App. 12a, 14a). These assertions are contrary to the record; the contracts are in evidence and reflect that neither the first USW contract, nor any that followed, contained any racial designation of jobs. (The district court found, with ample record support, that USW did not "foster the discrimination—of treating certain jobs as being for one race or the other—which was being practiced by custom in the plant" (App. 41a)).

It is apparent too from the fact that the vast majority of both whites and blacks were in integrated departments—and that whites were dispersed among virtually all departments (App. 128a)—that any disincentive to transfer to another department flowing from the use of departmental age as the measure of seniority affected members of both races in the same manner. Moreover, while some departments may have had greater proportions of blacks than others, the record does not establish that the departments with higher proportions of blacks were "the least remunerative departments" as the court of appeals repeatedly asserts. See App. 10a, 12a. In its initial opinion, the district court had prepared a chart that showed "that blacks were not disproportionately assigned to less desirable departments," and it concluded that the basis for ranking departments on the chart—the job class range within the department—was a "rough index of earnings potentials in the absence of other more reliable data" (App. 82a, 128a, 127a n. 27). The court of appeals in its first opinion had held that this " 'rough index' conclusion . . . is not clearly erroneous" (App. 82a-83a). In its second opinion, issued after *Teamsters*, the district court found it unnecessary to address further the issue of the relative desirability of departments; it was enough to dispel any possible inference of discriminatory motive that "significant numbers of both white and black employees" were affected "in an identical manner" by the "lock-in" effects of the system (App. 29a). The court went on, however, in *dictum*, to observe that a conclusion that "a somewhat greater impact was felt by blacks than by whites . . . is by no means certain" (App. 30a). With this background, the court of appeals' bare assertion that blacks were assigned to "the least remunerative departments" is inexplicable.

With respect to finding 5, the court of appeals in effect made its own contrary "finding" without any determination that the finding of the district court was clearly erroneous. Thus, for example, the court of ap-

peals stated that "[t]he record evidence indicates that a significant number of one-race departments were established upon unionization . . . and, during the next twenty-five years, one-race departments were carved out of previously mixed departments" (App. 11a). That court went on to term the creation of these departments "arbitrary" (App. 12a) and to "find" that "[t]he establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races" (App. 11a).

In fact, the record shows, that within the USW bargaining unit, the only changes upon unionization from the Company's pre-existing operational departments were changes in three departments that resulted from the NLRB's definition of that bargaining unit: jobs were not included in three departments under the USW contract because those jobs were not within the USW bargaining unit as defined by the NLRB. See App. 35a-36a; see also Brief Appendix bound herewith (hereinafter cited as: "Br. App.") 8a-10a. In two of the three instances "one-race" departments resulted, involving a combined total of six employees. Br. App. at 8a-10a. Subsequent to unionization, a small number of new departments were created, for a variety of reasons. Four of these, with a combined total of less than 40 employees, were one-race departments. *Id.* at 10a-16a. In each case, the district court found upon substantial evidence that the department was established for legitimate reasons having nothing to do with race. *Id.* at 10a-16a.

Nowhere did the court of appeals acknowledge the overriding fact that at all times the vast majority of both black and white employees were in integrated departments: for examples, in 1947, 97% of all employees were in integrated departments, and in 1965, 96% of the blacks and 93% of the whites were in such departments. *Id.* at 10a-11a. Nor did the court mention that following

unionization several departments that had previously been one-race departments were integrated. *Id.* at 10a.

The court of appeals did not dispute finding 6 of the district court findings restated above at p. 40, *supra*, but instead focused on the differences in departmental structure as between the Bessemer plant and other plants that resulted from the NLRB's decision establishing separate bargaining units, as if those differences were somehow probative of the intent of the parties to the seniority system, USW and the Company (App. 11a). In this connection, the court of appeals also made the following "findings" (App. 12a, 14a):

> The evidence further indicates that the Pullman-Standard plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers.
>
> • • • •
>
> No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

But the district court had offered not only a "credible explanation," but the only plausible explanation the record allows: separate bargaining units resulted because the NLRB, based on its criteria for defining appropriate bargaining units, had divided the plant into three separate election units, and a different union prevailed in each unit. A result was that certain pre-existing operational departments which overlapped the bargaining units as defined by the NLRB had to be divided; in the words of the district court, "[h]ence—and it is difficult to understand how the company and USW could legally have done otherwise—it resulted that there were two Die & Tool and two Maintenance seniority units, each subpart being represented by a different union" (App. 36a). The

implication of the court of appeals that the effects of the NLRB certification on the structure of the seniority system are indicative of a discriminatory intent is irrational.

In this regard, it should be emphasized that from the beginning USW was the adversary of the IAM and the IBEW, the two AFL craft unions certified initially as bargaining representatives for certain of the employees at the Company's Bessemer plant. The contemporaneous documents (including the transcript of the NLRB hearing in 1941) establish beyond question, as the district court found,[46] that USW sought from the beginning to represent *all* of the production and maintenance employees in a single bargaining unit (JA 107, 288; App. 42a). While USW was initially unsuccessful in achieving that objective, it did not abandon its goal; as the district court found, by 1946 USW had acquired all of the jobs in the IBEW unit, and all of the jobs in the IAM unit except those held by employees who USW did not want because they had "scabbed" on USW strikes. See *supra* at 23-24, and n. 39. The vast majority of those whose jobs thus were transferred into the USW bargaining unit were white—124 of the 152 employees who were transferred were white. See *supra* at 23-24, and n. 39; Br. App. 7a-8a, n. 3. Nonetheless, the court of appeals focused solely on the first of the transfers of jobs from the IAM unit to the USW unit, in 1941-1942, which had the result of shifting approximately 24 black employees into the USW unit. The district court found, and the court of appeals grudgingly acknowledged that USW's motivation in the 1941-1942 transfer was "in the interest of increased membership." App. 16a; see *supra* at 24.

---

[46] Despite the finding of the district court and the contemporaneous evidence, the court of apeals states that USW "allegedly" opposed the division of the plant into separate NLRB election units (App. 11a).

The totality of the events, just described, corroborates that finding. The district court added that "the USW cannot be charged with racial bias in its response to the IAM situation." See *supra* at 24.

In this light, the surpassing significance the court of appeals accorded to the "role" of the IAM is puzzling (App. 13a-14a, 16a):

> The district court's failure to recognize the I.A.M. as a party to the present case blemishes its consideration of the genesis of the seniority system. . . . The motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination. The I.A.M. was one of the unions which unionized the company in 1941 and the evidence reflects that the I.A.M. manifested an intent to selectively exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding.
>
> • • • •
>
> The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration.

We have already discussed "IAM's role in the creation and establishment of [USW's] seniority system": IAM, over USW's opposition, successfully sought a separate NLRB election among certain craft and craft-related employees, and prevailed in that election. Thereafter, IAM negotiated its own collective agreement with its own seniority system for its unit. IAM did not participate in the USW negotiations. Subsequently, two thirds of the jobs in its unit—most of which were held by white employees—were transferred to USW's unit. See *supra* at 23-24, and n. 39. The complaint in this case challenged *only* the seniority system established by USW and the Company, not whatever system IAM and the Com-

pany established for the IAM unit. See *supra* at 23, n. 38. And, the district court accordingly treated this case as involving only a challenge to the USW system. See *supra* at 23. The district court's finding that the actions of IAM, regardless of IAM's motives (which are less than clear on this record (see Br. App at 7a-8a, n. 3)), shed no light on whether the USW system was motivated by a discriminatory purpose is on this record unimpeachable. The court of appeals' "finding" to the contrary, once again, is irrational. The proposition that a competitor's motive is to be attributed to his opponent defies both reason and common sense.

Indeed, as our demonstration to this point shows, the "findings" on which the court of appeals rested its "ultimate finding" of discriminatory purpose (see App. 15a-16a quoted *supra* at 26-27), had they been made by a district court, could not survive review under the clearly erroneous standard. The precise office of Rule 52(a) is to prevent the courts of appeals from supplanting careful, conscientious, and considered district court evaluations of the evidence with independent appellate findings of fact. The court of appeals' hopelessly flawed findings here attest to the wisdom of that rule—if such attestation be needed.

Because on this record the finding of "discriminatory purpose" made by the district court could not be upset as clearly erroneous, the appropriate disposition of this case at this point is to reverse the decision of the court below and to remand the case with an instruction to affirm the judgment of the district court that the seniority system does not violate Title VII.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed and the case remanded with an instruction to that court to affirm the judgment of the district court that the seniority system does not violate Title VII.

Respectfully submitted,

BERNARD KLEIMAN
General Counsel
United Steelworkers of America, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
United Steelworkers of America, AFL-CIO
Five Gateway Center
Pittsburgh, Penna. 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF, GOTTESMAN, COHEN CHANIN, WEINBERG & PETRAMALO
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202-833-9340)

LAURENCE GOLD
AFL-CIO
815 - 16th Street, N.W.
Washington, D.C. 20006

JEROME A. COOPER
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Ala. 35203

Counsel for Petitioners, United Steelworkers of America, AFL-CIO And Local 1466, United Steelworkers of America, AFL-CIO

APPENDIX

APPENDIX

THE FOUR FACTS WHICH THE COURT OF APPEALS DECLARED "SIGNIFICANT IN OUR DECISION," AND A COMPILATION OF THE RECORD EVIDENCE RELATING THERTO

The court of appeals invalidated the USW seniority system on the basis of its finding ("we find") that the system was negotiated and maintained with a discriminatory purpose. In reaching that finding, the court declared four facts "significant in our decision" (App. 16a). This appendix sets out the district court findings and the record evidence that relate to those four facts.

(1) "[T]he Manner by Which the Two Seniority Units Were Set Up"

A major part of the court of appeals' opinion is devoted to the impact that court thought the IAM had had upon the USW seniority system. That impact, the court believed, was manifested in two discrete ways: (1) the creation of two Die & Tool and two Maintenance Departments, and (2) the transfer of certain jobs from the IAM bargaining unit to the USW bargaining unit.

(a) *Creation of Two Die & Tool and Two Maintenance Departments*

The court of appeals' entire discussion of this subject was as follows:

> In attacking the rationality of the seniority units, appellants primarily attacked the two separate Die & Tool Departments and the two separate Maintenance Departments at Pullman-Standard. No similar situations existed at Pullman's other plants.[3] No

[3] At Pullman-Standard, there are two Die and Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union.

such division existed at Pullman-Standard prior to unionization and seniority. The district court placed primary responsibility for this situation on the N.L.R.B. In 1941, at the request of the petitioning unions, the N.L.R.B. divided the plant into three representational units for election purposes. This was allegedly done over the opposition of the predecessors of the U.S.W.,[4] which sought to represent all production and maintenance employees. The district court did not find this circumstance to diminish the bona fides of the seniority system between the company and the U.S.W. The court asserted that the separation within the various units was not, as in *Teamsters*, "consistent with National Relations Board precedent," *Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1965; but was required by a specific decision of the N.L.R.B. and the outcome of the elections. Accordingly, the court found the departmentalization at Pullman-Standard to be rational, in accord with industry practice, and consistent with N.L.R.B. policies.

• • • •

The evidence further indicates that the Pullman-Standard plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers.

• • • •

The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two

---

[4] The United Steelworkers (USW) evolved from the Steelworker's Organizing Committee (SWOC).

> separate bargaining units for its production and maintenance workers. [App. 11a, 12a, 16a.][1]

It is true that Bessemer is the "only [plant] in the Pullman family with two separate bargaining units" (App. 12a, see also 16a). But the record contains a readily apparent "credible explanation . . . to sufficiently justfy" that separation: the mandate of a government agency—the NLRB—decreeing separate bargaining units.

It is likewise true that "prior to unionization" there was only one Die & Tool Department and one Maintenance Department at Bessemer, and that the bifurcated departments which eventuated following unionization have no analogue at Pullman's other plants. But as the dis-

---

[1] The statement that the USW "allegedly" opposed the NLRB's division of the plant into three bargaining units, App. 11a, illustrates the court of appeals' unfamiliarity with the record. The record contains the transcript of the 1941 NLRB hearing at which USW stated its "contention . . . that the unit should consist of an industrial unit in which all production and maintenance employees are eligible" (JA 107), and USWA's motion for rehearing, following the NLRB's decision creating three units, urging the NLRB to "withdraw" that decision and instead create an "industrial unit [containing] all the production and maintenance employees" (JA 291-293).

A similar unfamiliarity is manifested in the treatment of the district court's explanation of why the separate IAM and USW bargaining units here were even more defensible than in *Teamsters*, that "[t]he separation into different bargaining units was not *merely*, as in *Teamsters*, 'consistent with National Labor Relations Board precedents,' 431 U.S. at 356; it was rather required by a specific decision of the NLRB and the outcome of the elections," App. 36a (emphasis added). The court of appeals translated this finding as follows (App. 11a):

> The court asserted that the separation within the various units was not, as in *Teamsters*, 'consistent with National Relations Board precedent,' *Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1865; but was required by a specific decision of the N.L.R.B. and the outcome of the elections.

trict court found, and the court of appeals did not dispute, the NLRB had placed some jobs in each of these departments in the USW unit, and others in the IAM unit (App. 36a). IAM and USW negotiated separately with the Company for separate collective bargaining agreements, in each of which was established a self-contained seniority system embracing only the employees in that unit (JA 167-205). Neither union had a representative at the other's bargaining meetings (JA 208, 212, 218, 222, 228, 230, 232-236, 239-240, 254, 256-257, 261-263, 268, 270). Given the organizing battle then being waged between the CIO (with which USW was affiliated) and the AFL (with which IAM was affiliated), and the bitter rivalry between these two unions at this plant (JA 337-338; see also Br. at 24-25, n. 39 and *infra*, at 6a-7a, and n. 3), the two unions did not jointly negotiate a seniority system providing inter-unit seniority at Bessemer or elsewhere. As the district court concluded, it is difficult to understand what *else* could have been done except to split the departments for seniority purposes along the bargaining unit lines demarcated by the NLRB (App. 36a). And as that court further observed:

> If there was any industry practice to combine positions represented by different units into the same seniority unit, this court was certainly not presented with evidence to that effect. [App. 37a]

While the court of appeals did not explain *why* the creation of the multiple departments warranted an inference that USW's seniority system was discriminatorily motivated, the district court did explain why such an inference was *not* warranted:

> The existence of these divided departments is due to actions of the NLRB in 1941, when it—at the request of other petitioning unions—divided the plant into three representational units . . . This was done over the opposition . . . . of the USW, which sought

to represent all production and maintenance employees. The company properly adopted a "hands-off" attitude on formulation of election units . . .

. . . The collateral attack on the NLRB decision by plaintiffs in this litigation, filed more than twenty-five years later, must fail, if for no other reasons, because the real defendants—the company and the USW—are not chargeable with responsibility for those events and because such matters do not impair the validity of the seniority system to which they did agree. [App. 35a-37a].

(b) *Transfer of jobs from the IAM bargaining unit to the USW bargaining unit*

The court of appeals' entire discussion of this subject is as follows:

As of the date of its certification to represent employees of Pullman-Standard, November 19, 1941, the I.A.M. unit included twenty-four black workers. Shortly thereafter, agreements between the I.A.M. and Steel Workers Organizing Committee (S.W.O.C.)[8] resulted in the I.A.M. giving its black members to the S.W.O.C. in return for two of the S.W.O.C.'s white members, which resulted in the I.A.M. being an all-white bargaining unit.

• • • •

The [district] court took into consideration the plaintiffs' contention that the I.A.M. effectively eliminated blacks from its membership. The court dismissed the relevancy of this point by concluding that the U.S.W. cannot be charged with racial bias in response to the I.A.M. situation and that the

---

[8] See footnote 4. [The United Steelworkers (USW) evolved from the Steelworkers' Organizing Committee].

U.S.W. sought to represent all workers, black and white, in the plant.

The district court's failure to recognize the I.A.M. as a party to the present case blemishes its consideration of the genesis of the seniority system. Although the I.A.M. is a party to the present case for purposes of relief other than money damages, it is indeed a party. The motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination. The I.A.M. was one of the unions which unionized the company in 1941 and the evidence reflects that the I.A.M. manifested an intent to selectively exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding.

* * * *

The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination . . . [App. 12a, 13a-14a, 15a-16a]

As the district court recognized (App. 42a), the bona fides of *USW's* seniority system do not turn on whether the IAM was badly motivated in 1941-42. This case attacks only *USW's* seniority system, not the separate seniority system negotiated by IAM (see Br. at 23, n. 38). As we have noted, the IAM and USW were rivals, not members of a joint venture, and the evidence is clear that IAM had no voice in negotiating the USW contract.[2]

---

[2] While the court of appeals speaks of IAM "giving its black members" to USW, what actually happened is that the jobs held by those blacks were transferred from the IAM bargaining unit to the USW bargaining unit. If, indeed, IAM for reasons of race excluded from its unit jobs held by black employees which belonged

The employees whose jobs were transferred from the IAM bargaining unit to the USW unit were accorded the same seniority treatment as all other employees in the USW unit (App. 42a). There is nothing in the record to suggest that USW was motivated by race in the treatment it accorded those employees under the USW seniority system. Nor does the record suggest that USW's *acceptance* of the transferred jobs was motivated by discriminatory animus. USW pursued with equal vigor acquisition of the jobs held by *white* employees in the IAM and IBEW bargaining units; indeed, the court of appeals agreed with the district court that USW had accepted the transfer "in the interest of increased membership," not out of discriminatory motivation.[3]

---

in that unit, those employees might arguably have a claim that *IAM's* seniority system is unlawful insofar as it fails to accord them the seniority credit they would have enjoyed in the IAM unit had their jobs remained there. We say "arguably," because the IAM agreement provides only occupational seniority (JA 177), and consequently the black employees would have had no greater rights to other jobs in the IAM unit had they been kept in that unit than they possess as occupants of jobs in the USW unit. Nor would a contention that IAM's choice of occupational seniority is racially motivated likely succeed: IAM's unit consisted solely of white employees when the choice was made (JA 177; App. 42a ("all white IAM remnant")).

[3] The court of appeals' finding that the reason for the transfer of the jobs in 1941-42 was IAM's desire to rid its unit of blacks is not precluded by this record, but it is by no means compelled. Thus, if the appellate court thought that fact critical to resolution of this case, the appropriate course was to remand to permit the district court (which had noted but passed over the question as irrelevant) to decide it in the first instance. On this record, the likelier explanation for the 1941-42 transfer is that *it was sought by USW, not IAM.* Prior to the transfer, USW had advised the NLRB that it believed the NLRB had placed employees in the IAM unit who did not belong there (JA 292). Thereafter, USW persisted in efforts to gather up *all* the jobs which the NLRB had placed in the IAM and IBEW units (gaining in 1944 jobs held by 96 whites and 4 blacks in the IAM unit, JA 174-175, 255, and in 1946, all of the jobs

(2) "[T]he Creation of the Various All-White and All-Black Departments Within the U.S.W. Unit at the Tim of Certification and in the Years Thereafter"

The second fact which the court of appeals declared "significant in our decision" was the creation of "various" one-race departments in USW's bargaining unit, both "at the time of certification" and "in the years thereafter" (App. 16a). The court of appeals stated its understanding of the record on this point as follows:

> The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty-five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races. [App. 11a]

(a) *"At the Time of Certification"*

In preparation for the NLRB election, the Company submitted a voting list which, *inter alia*, shows the racial composition of each of the Company's departments immediately prior to unionization (JA 103). That list shows that prior to unionization five small departments were "one-race" departments. The four all-white de-

---

in the IBEW unit, held by 28 employees, all white, JA 302, 304; App. 41a. Moreover, at the NLRB hearing prior to the certifications, IAM had expressly claimed all black as well as white employees who worked within its jurisdiction (JA 149). That is not consistent with the court of appeals' declaration, for which the court cited no evidence, that it is "obvious" that the transfer occurred because the IAM wished "to exclude black workers from its bargaining unit" (App. 15a). Those were questions which, if truly pertinent to the resolution of this case, were for the district court to decide in the first instance.

partments—Plant Protection, Lumber Yard, Welding, and Template—collectively contained 94 employees[4] (17% of the 563 whites employed at that time). The only all-black department was the Truck Department, with 14 employees (2% of the 650 blacks employed at that time). 98% of the blacks were in integrated departments.

Coincident with unionization, two new one-race departments were created within the USW bargaining unit: Die & Tool, with 2 black employees, and Janitors, with 4 black employees.[5] Thus, with unionization, the percentage of blacks who were in "one-race" departments rose from 2% to 3%.

The two new one-race departments were a direct product of the NLRB's bargaining unit definitions. The NLRB placed the jobs of all of the whites who had been in the Die & Tool Department in the IAM bargaining unit, but placed the jobs of the two black employees in the USW unit (JA 165-166).[6] The white employees who had been in a department with the janitors all were clerical employees who were excluded by the NLRB from *all* bargaining units (JA 104, 165-166), and USW thus had no right to include them under its seniority system.

Following unionization, then, 97% of the blacks were in integrated departments. The one-race departments which the Company had established prior to unionization obviously were not shaped with seniority in mind; they had been established for operational purposes (JA 114-

---

[4] Plant Protection, 12 employees; Lumber Yard, 29 employees; Welding, 50 employees; and Template, 3 employees.

[5] By reference to JA 104, the four blacks in the Superintendence Department became the Janitors Department, and by reference to JA 103, the two blacks in the Die & Tool Department became the USW Die & Tool Department.

[6] As described *infra*, the Die & Tool Department became integrated in 1946.

115). And the two new one-race departments, involving six employees, resulted inevitably from the NLRB's definition of USW's bargaining unit.

Moreover, in the years immediately following unionization three of the one-race departments became integrated: the Welding Department in 1943: the Lumber Yard (now called Lumber Stores) in 1944; and the Die & Tool Department in 1946.[7] Thus, between 1942 and 1946, the number of one-race departments in USW's unit was *reduced* from seven to four. The number of *occupants* in these remaining one race departments totalled 20 whites and 21 blacks in a bargaining unit of over 1,300 employees.[8] 97% of the employees were in integrated departments.

(b) *"In the Years Thereafter"*

At all times, the number of employees in "one race" departments constituted a small fraction of the employees in the plant. In 1947, as just noted, 97% of the employees were in integrated departments. In 1965, more

---

[7] The first seniority list in evidence is that of June 1, 1947 (PX 2 (1978 Trial)). That list shows several blacks in the Welding Department (identified by badge numbers in the 800's), the most senior of whom already had 4½ years seniority in the department. It shows 13 blacks in the Lumber Yard (identified by badge numbers in the 1600's), the most senior of whom already had more than 3 years' seniority. And it shows three whites (and nine blacks) in the Die & Tool Department (identified, respectively, by badge numbers in the 2000's and 1000's), the most senior white having eleven months' seniority in the department.

[8] The remaining one-race departments, and their populations, according to the 1947 seniority list, were as follows: Template (3 whites), Safety (Watchmen) (formerly called Plant Protection) (17 whites), Truck (14 blacks), and Safety (Janitors) (7 blacks). The total USW bargaining unit population is derived by counting all names on the seniority list excluding employees in IAM's Maintenance and Die & Tool Departments and those listed as "Salary" and "Military Service."

than 96% of the blacks and 93% of the whites were in integrated departments (see Br. at 6-7). And an examination of the particulars of the handful of instances in which such departments were created subsequent to 1941 shows that USW and the Company were not creating new departments to achieve "continued separation of the races" (App. 12a).

In the late 1940's, the Company unilaterally created a separate Inspection Department, drawing the inspectors from the various operating departments into a separate unit (App. 32a). The 1950 seniority lists shows nine employees in this unit, all white (PX 5 (1978 Trial)). The district court found this change "certainly rational—removing them [the inspectors] from responsibility to the very persons whose production they were called upon to inspect" (App. 32a). A separate Inspection Department existed at Pullman's Butler plant, where less than 1% of the employees were black (JA 206), at Pullman's Hammond plant, also with a small black workforce (JA 242), and at plants of other railroad equipment manufacturers (JA 330, 332).[8]

In 1954, coincident with the return to departmental seniority, the parties split out three small new departments from the Maintenance Department. Two of these were "one-race" departments: the Powerhouse (with five white employees) and the Boilerhouse (with three white

---

[8] The district court noted further that, as USW had switched from departmental to occupational seniority in 1947 (see Br. at 10), the creation of the Inspection Department "deprived no one, white or black, of employment opportunities" (App. 32a, n. 8)—no one in an operating department could have exercised seniority on the inspector job even when that job was in his department. "With the return several years later to departmental seniority, it did, in retrospect, mean a loss of opportunities to both whites and blacks in the operating departments (*ibid.*).

employees).[10] Following the removal of these departments, the remaining population of the Maintenance Department was 49 whites and 14 blacks (PX 9 (1978 Trial)).[11] Thus, to the extent that this split-out deprived those remaining in the Maintenance Department of access to Powerhouse and Boilerhouse jobs, it did so for many more whites than blacks. And the record amply demonstrates the non-discriminatory rationale for separating the Powerhouse.[12] While the record is silent as to the reason for creation of the Boilerhouse Department, it does show that that department never had more than three employees, and ceased operating prior to the effective date of Title VII (App. 31a, n. 5; JA 336).

Also in 1954, coincident with the return to departmental seniority, the parties moved the 22 pipefitters and pipefitter helpers (all of whom were white) out of the integrated Steel Erection Department and into a new Air Brake Department (PX 8, 9). The rest of the Steel Erection Department remained intact (including 45 whites who were not pipefitters or pipefitter helpers). These whites, equally with the blacks in the Steel Erec-

---

[10] JA 336. Cf. PX 8, 1978 Trial (seniority list of June, 1953) with PX 9, 1978 Trial (seniority list of Sept., 1954). The third new department split out from Maintenance—the Railroad Department—was integrated (PX 9).

[11] On this seniority list, badge numbers below 2000 were assigned to blacks, and badge numbers from 2000 up to whites.

[12] At the NLRB hearing in 1941, the plant manager had testified that it would be dangerous to allow even other electricians to move freely into the powerhouse job: "We like to know what experience a man has had, and what he has been doing, instead of just shooting up the works" (JA 142-143). When the powerhouse employees and the other electricians were certified by the NLRB in an (all-white) IBEW craft unit, Powerhouse was established as a separate department from Electrician (JA 336). Except for a brief period in 1946-47, no other employees had ever had seniority rights in common with Powerhouse employees (App. 41a). There is a separate Powerhouse Department at Pullman's Butler plant, where less than 1% of the employees are black (JA 206).

tion Department, were deprived of whatever departmental seniority rights they might otherwise have enjoyed with respect to pipefitter jobs had those jobs not been moved. Again the record affords an obvious nondiscriminatory explanation for the move.[13]

The foregoing constitute the only "one-race" departments in the USW bargaining unit. While the court of appeals recites that the creation of one-race departments continued for twenty-five years following unionization, App. 11a, in fact the only such events are those described above, the latest of which occurred seven years following unionization.

The court of appeals believed there were two more "one-race" departments created:

> [T]he seniority rosters indicate that between 1947 and 1952, the all-white watchmen and all-black janitors were both in the Safety Department. The 1953 seniority list carries both jobs under a Plant Protection Department. The 1954 seniority list shows the janitors in an all-black Janitors Department and the watchmen in an all-white Plant Protection Department. They remained separate departments until the time of trial. [App. 12a]

In the period prior to unionization, the Company had organized the plant so that watchmen were in a depart-

---

[13] Pipefitters are craftsmen; precisely because that is so, the NLRB's original certification had placed them in the IAM unit ("employees in air-brake department," JA 166) while virtually all other Steel Erection employees were placed in the USW unit. USW brought the pipefitter jobs into its bargaining unit when it captured most of the IAM's unit in 1944 (see p. 7a, n. 3, *supra*), but that did not alter the reality that these jobs were substantially different from the others in Steel Erection.

ment of their own (then called the Plant Protection Department). Janitors were in a different department (then called Superintendence) (JA 103-104). When the NLRB defined the USW bargaining unit to include "watchmen" and "plant protection employees," JA 160, the Company (which until then had taken no position as to the definitions of appropriate units, JA 155), filed a motion making a single request: that the NLRB amend its decision by declaring that "[w]atchmen and plant protection employees shall be excluded from both the craft and industrial units" (JA 289). In that motion, the Company argued as follows:

> [I]t is inappropriate that watchmen and plant protection employees be included in any collective bargaining unit for the obvious reason that in the event of labor troubles of any kind or character such watchmen and plant protection employees should have no selfish or personal interest in the result of any such labor troubles, but should be in a position to discharge their full duties free of any influence or selfish or personal interest in the union or any such labor difficulties. [JA 290]

In 1941, it was permissible for the NLRB to include guards in a unit together with production and mainteance employees; this Court approved that practice in *Labor Board v. Jones & Laughlin Co.*, 331 U.S. 416, 422-427 (1947). Later that year, Congress, reacting to that decision, added § 9(b)(3) to the NLRA, 29 U.S.C. § 159(b)(3). That section provides:

> [T]he Board shall not . . . (3) decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises [and] no labor organization shall be certified as the rep-

resentative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Congress thus reacted to the precise concerns which the Company in this case had addressed to the NLRB six years earlier. The NLRA amendment, however, came too late for Pullman; the guards were already in the USW unit.

The Company thereafter acted to protect its interest, as best it could, by insulating its guards from intermingled seniority with production and maintenance employees. Following the adoption of departmental seniority in the first USW contract, the Company maintained the guards as a separate department (JA 336). Contrary to the court of apepals' understanding, the Company never relented from that course. To be sure, the Company treated watchmen and janitors as both in the "safety department" between 1947 and 1954, but that nominal joinder (which was prompted by the fact that guards and janitors reported to the same supervisor (PX 2 (1978 Trial)) was of no seniority significance because occupational seniority prevailed under the USW contracts during that period (App. 40a). The 1947 seniority list (PX 2 (1978 Trial)) is the clearest proof that the Company regarded this joinder as different from the other departmental structures in the plant. With respect to every other department, the 1947 seniority list included all employees on a single roster, from the most senior on down to the most junior, without regard to job classifications. With respect to the "Safety Department" there were two separate rosters, one entitled "Safety Department (Watchmen)" and the other entitled "Safety Department (Janitors)." When the USW agreement was amended in 1954 to return to a departmental seniority system, the Company consistent with its long-term view

of its interest in preserving a complement of guards who were insulated from all other employees split the safety department into two departments, one containing the guards, the other the janitors.

At Pullman's Hammond plant, where a majority of the janitors are white, there is a separate janitor department just as at Bessemer (J.A. 242).[14]

An epilogue, furnished by the record, was noted by the district court in its decision (App. 37a, n. 18):

> It may be noted that the possibility of merging the Janitors and Plant Protection employees was raised in 1962 by a white member of the union's negotiating committee, but refused by a black member of that negotiating committee who was a member of the Janitors department.[15]

That reaction is not surprising. As the district court had learned at the first trial in this case:

> It is clear from the evidence that the blacks in the Janitor department prefer it to most—and a few of them prefer it to all—departments. The actual earnings of employees in the Janitors department indicate that, due to greater stability of employment, it may indeed have greater earnings potential than employment in a number of other departments with higher [job class] positions [App. 131a].

(3) "Conditions Of Racial Discrimination Which Affected The Negotiation and Renegotiation of the System"

The third fact which the court of appeals declared "significant in our decision" is "conditions of racial discrimination which affected the negotiation and renegotia-

---

[14] This is equally true at some plants of other railway equipment manufacturers, see e.g. JA 335.

[15] See JA 238.

tion of the system" (App. 16a). It is not altogether clear what this means. Certainly there were "conditions of racial discrimination" prevalent at the plant during the period (1941-1954) that the seniority system took its shape. But nothing in the court of appeals' opinion explains the basis for its finding that those conditions "affected" the negotiation of the seniority system. Apparently, the third fact deemed "significant" by the court to its ultimate finding of discriminatory motive is simply that there was contemporaneous racial discrimination at the time that the seniority system was negotiated.

The district court had found that there was no warrant to infer from the Company's contemporaneous discrimination that the seniority system was improperly motivated, because that system was the product of USW's aims and policies, USW pursued "colorblind objectives," blacks had participated equally with whites in determining the form of the system, and the same system had eventuated in virtually all industrial plants including those where race could not have been a motivating factor.

The court below repeated, and no where challenged, the district court's findings that the system was the one sought by USW, that blacks had participated equally with whites in determining USW's position thereon, and that it was the "modal" system in American industry. However, the court of appeals' opinion contains additional statements concerning USW's attitude on race.

First, the court twice stated that the first USW contract excluded blacks from the better jobs:

> The first U.S.W. contract with Pullman-Standard, providing for departmental seniority, excluded blacks from the better jobs.
>
> * * * *
>
> The record makes clear that blacks were restricted from the better jobs under the first U.S.W. contract. [App. 12a, 14a].

There was in fact nothing in USW's first contract[16] (nor in any subsequent one)[17] that allocated jobs on the basis of race. USW had sought to obtain in its first contract a provision that departmental seniority would control competition for promotions (see Br. at 14, n. 27); had the Company agreed to that provision, the 97% of the blacks who were then in integrated departments (Br. App. 9a, *supra*) would have had a contractual right to promote to traditionally white jobs on the basis of seniority. The Company resisted that demand until 1956 (App. 26a). The consequence was *not* that the USW contract excluded blacks from the better jobs, but rather that the USW contract had no application to the determination of who would get better jobs. The Company, by refusing USW's demands, retained the unilateral power to make all job assignments, including promotions. The Company was free to assign blacks to any and all jobs in the plant; nothing in the contract precluded its doing so. The *Company* chose instead to continue discriminating in making those assignments.[18]

Second, the court of appeals' opinion contains an implication that under the first USW contract "[b]lacks were relegated to the least remunerative departments." App. 12a. The USW contract did not mention race at all, and it did not determine to which departments employees would be assigned (that power was the Com-

---

[16] PX 33 (1978 Trial).

[17] PX 34-45 (1978 Trial).

[18] Respondents, in their Brief in Opposition, conceded that USW's first contract did not allocate jobs on the basis of race (Br. Opp. 10-11, n. 13). Respondents suggested that that is not what the court of appeals meant by the statements we have quoted above; rather, respondents said, the court of appeals simply meant that USW's first contract, by establishing a system of departmental seniority, created a disincentive to transfer which perpetuated the effects of the Company's discrimination in job assignments (*ibid.*).

pany's, to exercise unilaterally), nor did it impose any "no-transfer" rule which would preclude employees, black *or* white, from moving between departments.[19] PX33 (1978 Trial). To be sure, as is true of every departmental seniority system, an employee transferring between departments would lose accumulated seniority and begin accruing competitive seniority anew in the new department.

Third, the court of appeals noted that "in 1941, some of the 'mixed' jobs even had different wage scales for whites and blacks" (App. 13a). The first USW contract, signed in April, 1942, did not specify wage rates. It provided for a uniform wage increase for all employees. And, most importantly, it provided for "local plant adjustment and settlement" . . . "[w]here alleged inequalities in wage rates prevail."[20] Throughout the first few years of unionization, the elimination of discriminatory wage rates was a major USW priority throughout the South. Myrdal, *An American Dilemma*, 1117 (1944). At the Bessemer plant, that subject was fought out not only at the bargaining table and on the picket line, but in repeated forays before the War Labor Board (JA 313-316, 216-220).

---

[19] The court of appeals' opinion states that "the [seniority] system *and the attendant no-transfer rule* locked blacks into the least remunerative positions," App. 16a; emphasis added. As respondents conceded in their brief in opposition, p. 11, n. 13, there was no rule at this plant precluding transfers between departments. Respondents suggested therein that the court of appeals was using the term "no-transfer rule" to describe the "seniority forfeiture provision" of the departmental seniority system (*ibid.*).

[20] PX 33 (1978 Trial), pp. 2-3.

(4) "[T]he Extent To Which the System And the Attendant No-Transfer Rule Locked Blacks Into the Least Remunerative Positions Within the Company"

The fourth and final fact the court of appeals deemed "significant to our opinion" is "the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the Company," App. 16a.[21]

The court of appeals' finding overlooked an important feature of the seniority system, highlighted in the district court's opinion, i.e. that promotions were on the basis of departmental seniority. That provision had been the instrument, even prior to the effective date of Title VII, for enabling blacks to escape from the jobs to which the Company had assigned them and promote immediately to their "rightful place" within their departments. As the district court explained:

> [The seniority] system did not then provide—nor has there been any subsequent effort to erect—barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. [App. 43a].

Because the historic Company assignment practice had not been "to segregate departments," but only to segregate jobs *within* departments (App. 55a), at all times 96% or more of the black employees were in integrated

---

[21] So that there can be common ground in analyzing this finding of fact, we accept respondents' characterization in their brief in opposition that by "the attendant no-transfer rule" the court meant the "seniority forfeiture provision" of the departmental seniority sysem (Br. Opp. 11, n. 3). As the parties are agreed that there was no rule at this plant prohibiting transfers between departments (see Br. App. n. 19, *supra*), that is the only construction of the court of appeals' opinion which could make the words "attendant no-transfer rule" even arguably faithful to the record.

departments containing "white" jobs as well (see Br. App. *supra*, at 10a-11a). The seniority system entitled these black employees, whenever a vacancy arose within their departments, to exercise their departmental seniority to claim the job of their choice.

The seniority system, while providing immediate access to jobs *within* one's department, did create disincentives to transferring *between* departments. The court of appeals stated that "[b]lacks were relegated to the least remunerative departments" (App. 12a). The record shows that blacks were (and always had been) "relegated" to virtually all the departments in the plant (App. 128a; Br. App. *supra*, at 10a-11a). Of course, if one were to rank the departments in the order of their relative desirability, one could then determine whether a disproportionately large number of blacks, as compared to whites, were in "undesirable" departments. The court of appeals apparently believed that the district court had found that such a ranking would disclose a disparity in favor of whites; for, the court of appeals said:

> The district court acknowledged that a somewhat greater impact might be felt by blacks than by whites if one were to rank the . . . departments according to some perceived order of desirability . . . [App. 10a].

What the district court had actually said was the following:

> It may well be that a somewhat greater impact was felt by blacks than by whites, although—as indicated in the chart considered in Pullman-Standard I for a somewhat different purpose and subsequently analyzed in Pullman-Standard II—*this conclusion is by no means certain.* [App. 30a; emphasis added].

The chart in Pullman I to which the court referred (App. 128a), which ranked the departments by job class range, reflected no disparate impact upon blacks (App. 128a-130a). The court explained that it had used job class

range as the criterion for determining the relative desirability of departments because "it does provide a rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job class worked" (App. 127a, n. 27). On appeal from that ruling the court of appeals (in an earlier opinion, not the one now under review) held that the district court's finding that the chart provided a "rough index of earnings potentials" was "not clearly erroneous" (App. 82a-83a). Thus, as the court of appeals then recognized, the proof in the record at that time (which has not been supplemented on this point in the intervening years) was "insufficient to demonstrate loss" (App. 84a-85a).

The district court's statement quoted above thus was not a finding that blacks were more disadvantaged than whites by the departmental seniority system, but merely a proviso that if other criteria were used to determine the "relative desirability" of departments than that which the court itself had found most appropriate, it "may well be" that the result would reflect "a somewhat greater impact [upon] blacks than [upon] whites" (App. 30a). The district court found it unnecessary to pursue the line of inquiry further, concluding that no inference of discriminatory motivation would be appropriate regardless of its resolution:

> Where, . . . as here, a rule affects significant numbers of both white and black employees—and does so in an identical manner—it would be a misreading of Teamsters . . . to determine "neutrality" on the basis of its quantitative effects. [App. 20a].

The district court's point was that given the dispersion of whites and blacks among the departments, no matter what criteria of relative desirability were used to rank departments there would be substantial numbers of both whites and blacks in the departments ranked as "undesirable."

Nos. 80-1190 and 80-1193

Office - Supreme Court, U.S.
FILED
OCT 10 1981
ALEXANDER L.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PULLMAN-STANDARD, a Division of Pullman, Incorporated,

Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

JACK GREENBERG
JAMES M. NABRIT, III
PATRICK O. PATTERSON
JUDITH REED
Suite 2030
10 Columbus Circle
New York, New York 10019

ELAINE JONES*
BARRY L. GOLDSTEIN
C. LANI GUINIER
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005
(202) 638-3278

OSCAR W. ADAMS, III
2121 Eighth Avenue, North
Birmingham, Alabama 35208

* Counsel of Record

TABLE OF CONTENTS

	Page
Table of Authorities	iv
STATEMENT OF CASE	1
A. Proceedings	1
B. Facts	11
1. Racial Policies of the Company and Union, ...	12
a. Pullman-Standard ..	12
b. Steelworkers	14
c. Machinists	20
2. Recognition of Unions and Plant Division	24
a. Structure Prior to Union Certification	24
b. Certification of the Bargaining Units ..	25
3. Development of the Seniority System	34

Page

a. Division of Bargaining Units 34

b. Application of the Seniority System Within the Steelworkers' Bargaining Unit ... 37

4. Operation of the Seniority System After 1956 45

5. Racial Impact 49

SUMMARY OF ARGUMENT 57

ARGUMENT 64

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE SENIORITY SYSTEM WAS INTENTIONALLY DISCRIMINATORY AND THEREFORE WAS NOT PROTECTED BY § 703(h) .. 64

A. Section 703(h) must be interpreted and applied in a manner which is consistent with the history and purpose underlying Title VII .. 64

B. The seniority system was not bona fide, and differences in treatment thereunder were the result of intentional discrimination 80

Page

1. Burden of Proof 85

2. Racial Practices of Defendants 87

3. Development and Maintenance of the Seniority System 91

4. Application of the Seniority System and its Effect 106

5. Rationality of the Seniority System NLRB ... 119

II. THE FIFTH CIRCUIT PROPERLY EXERCISED ITS APPELLATE FUNCTION TO CORRECT ERROR BY A DISTRICT COURT 136

CONLCUSION 152

Appendix A, Tables -1-3

Appendix B

TABLE OF AUTHORITIES

Cases:

	Page
Abbott Laboratories v. Portland Retail Druggists Ass'n., 415 U.S. 1 (1976)	76
Aetna Iron and Steel Co., 35 NLRB 136 (1941)	129
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	79,85
Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974)	125
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	59,82,84,88,92, 93,105,106,112
Barnes v. Jones County School District, 554 F.2d 804 (5th Cir. 1977)	93
Baumgartner v. United States, 322 U.S. 665 (1944)	137
Bigelow v. Virginia, 421 U.S.	151
Brashear Freight Lines, Inc., 13 NLRB 191 (1939)	151,127

Cases:

	Page
Brinkman v. Gilligan, 583 F.2d 243 (6th Cir. 1978)	149
Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972)	84
California Brewers Association v. Bryant, 444 U.S. 598 (1980)	58,75
Carter Manufacturing Co., 59 NLRB 804 (1944)	131
Castaneda v. Partida, 430 U.S. 482 (1977)	51,52,90, 109,113
Christopher v. State of Iowa, 559 F.2d 1135 (8th Cir. 1977)	137,141
City of Mishawaka, Ind. v. Am. Electric Power Co., 616 F.2d 976 (7th Cir. 1980)	142
City of Mobile v. Bolden, 446 U.S. 55 (1980)	93
Coleman Co., 101 NLRB 120 (1952)	129
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)	88,93,105,113

Page

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 86

County of Washington v. Gunther, 49 USLW 4623 (1981) 60,74,77, 86,87

Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) 93,105,113,150

Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 101 S. Ct. 783 (1981) 66,141

District of Columbia v. Pace, 320 U.S. 698 (1944) 140

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 58,73,77,78

Galena Oak Corp. v. Scofield, 218 F.2d 217 (5th Cir. 1954) 137

Georgia Power, 32 NLRB 692 (1941) 130

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 81,85

Group Life and Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, (1979) 76

Page

Hazelwood School District v. United States, 433 U.S. 299 (1977) 50,51,52, 109,113

Handy-Andy, Inc., 228 NLRB 447 (1977) 130

Hughes Tool Co., 147 NLRB 1573 (1964) 130

International Brotherhood of Teamsters v. United States, 321 U.S. 324 (1977) ..... passim

James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978) 68

Jennings v. General Medical Corp., 604 F.2d 1300 (10th Cir. 1979) 141

Karavos Compania, etc. v. Atlantic Export Corp., 588 F.2d 1 (2d Cir. 1978) .. 137,140

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 136,145

Keyes v. School District No. 1, 413 U.S. 189 (1973) 61,88,93,113

Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) 142

Page

Larus and Brother, Co., 62 NLRB 1075 (1945) 127,129

Lee v. Washington County Board of Education, 625 F.2d 1235 (5th Cir. 1977) 93

Levin v. Mississippi River Fuel Co., 386 U.S. 162 (1967) 151

Manning v. Trustees of Tufts College, 613 F.2d 1200 (1st Cir. 1980) 142

Matter of U.S. Bedding, Co., 52 NLRB 382 (1943) 128,129

Norfolk Southern Bus Corp. 76 NLRB 488 (1948) 129,130

Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950) 141

Pacific Maritime Association, 112 NLRB 1280 (1956) 128

Piedmont & Northern R. Co. v. ICC, 286 U.S. 299 (1932) 76

Personnel Administrator of Massachusetts v. Feeney, 422 U.S. 256 (1979) 82,112,121

Peyton v. Rowe, 391 U.S. 54, (1968) 76

Page

Poyner v. Lear Siegler, Inc. 549 F.2d 955 (6th Cir. 1976) 141

Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968) 69

Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977) 93,105

Schultz v. Wheaton Glass Co., 421 F.2d 267 (3d Cir. 1970) 137,141

Sears v. Atchison, T. & S. F. Ry., 645 F.2d 1365 (10th Cir. 1981) 67

Sears, Roebuck and Co. v. Johnson, 219 F.2d 590 (3d Cir. 1954) 141

Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co., 139 F.2d 288 (2d Cir. 1943), cert. denied, 321 U.S. 795 (1944) 136

Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976) 141

Strauder v. West Virginia, 100 U.S. 266 (1880) 92

Page

Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980) .....

Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970) 125

Terrell v. U.S Pipe & Foundry Co., 644 F.2d 112 (5th Cir. 1981) 69

Union Envelope Co., 10 NLRB 1147 (1939) 130

United States v. Bd. of School Commr's of Indianapolis, 573 F.2d 400 (7th Cir.) dert. denied, 439 U.S. 824 (1978) 83,84

United States v. City of Chicago, 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977) 141

United States v. First City National Bank, 386 U.S. 361 (1967) 86

United States v. General Motors Corp., 384 U.S. 127 (1977) 10,136,139,150

Page

United States v. Georgia Power Co., 634 F.2d 929 (5th Cir. 1981), cert. pending Electrical Workers Local No. 84 v. United States, 50 USLW 3080 (Aug. 25, 1981) ... 69

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972) 47

United States v. Oregon State Medical Society, 343 U.S 326 (1952) 146

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 63,136

United States v. Public Utilities Commission, 345 U.S. 295 (1953) 77

United States v. Singer Manufacturing Co., 374 U.S. 174 (1963) 138, 139

United States v. Texas Education Agency, 564 F.2d 162 (5th Cir. 1977), cert. denied, 443 U.S 115 (1979) 121

United States v. United States Gypsum Co., 333 U.S 364 (1948) 138,140

Page

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 146

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 21,65,71,77

Utah Copper Co., 35 NLRB 1295 (1941) 129

Veneer Prods, Inc., 81 NLRB 492 (1949) .....

Washington v Davis, 426 U.S 229 (1976) 62,84,112,113

Watts v. Indiana, 338 U.S 49 (1949) 135

Statutes and Rules:

National Labor Relations Act, 29 U.S.C. §§ 151, et. seq. 124

42 U.S. C. § 1981 3

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. 3,4,74,76,80

§ 703(h) 64,80

Rule 52(a), Fed. R. Civ. P. 135,137,138,142

Page

Legislative History:

110 Cong. Rec. 72,73,82

Legislative History of Titles VII & XI of Civil Rights Act of 1964 70

Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88 Cong., 1st Sess. (1963) 70

Hearings on equal Employment opportunity Before the General Subcomm. on Labor of the House Comm. on Education & Labor, 88 Cong., 1st Sess. (1963) 70

Hearings on Civil Rights Before Sub omm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) 70

Annual Reports - Federal Agency:

7 NLRB ANN. REP. (1942) ... 127

8 NLRB ANN REP. (1943) 127,132

9 NLRB ANN. REP. (1944) 127

Page

Other Authorities

Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969) 78

Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957) ... 130

Gould, Black Workers in White Unions 81977) 15,65

Harris, The Black Worker (Atheneum ed. 1974) 65

Hill, Black Labor and the American Legal System: Race, Work and the Law (1977) 65,68

Karson and Radosh, The American Federation of Labor and the Negro Worker, 1894-1949 in J.Jacobson, ed. The Negro and the American Labor Movement (1968) 21

King and Risher, The Negro in the Petroleum Industry (1969) 68

Marshall and Briggs, The Negro and Apprenticeship (1967) ... 65

Page

R. Marshall, The Negro and Organized Labor (1965) 65

Myrdal, An American Dilemma (Harper & Row ed. 1962) 65

Northrup, Organized Labor and the Negro (1944) 21,65

Northrup, The Negro in the Paper Industry (1969) 68

H. Northrup, The Negro in the Rubber Industry (1969) 68

H. Northrup, The Negro in the Tobacco Industry (1970) 68

Note, Discrimination in Union Membership, 12 Rutgers L. Rev. 543 81958) 130

Rubin, The Negro in the Shipbuilding Industry at 115-16 (1979) 68

Sovern, Legal Restraints on Racial Discrimination in Employment (1966) 70

Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563 (1962) 130

Page

Spero and Harris, The Black Worker (Atheneum ed. (1974) 67

Weaver, Negro Labor, A National Problem (1946) 65

Nos. 80-1190 and 80-1193

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

==========

PULLMAN-STANDARD, a Division of Pullman, Incorporated,

Petitioner, No. 80-1190,

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners, No. 80-1193,

v.

LOUIS SWINT and WILLIE JOHNSON, et al.

==========

On Writs of Certiorari to the United States Court of Appeals For The Fifth Circuit

==========

BRIEF FOR RESPONDENTS

==========

STATEMENT OF CASE

A. Proceedings

This employment discrimination case

was filed as a class action against Pullman-Standard, the International Association of Machinists and its Local 372 and the United Steelworkers of America and its Local 1466. The Bessemer, Alabama plant of the Pullman-Standard Company, the plant which is the focus of this lawsuit, has been closed permanently. 1/

This case has been tried three times and has resulted in three district court and two appellate court decisions. Only the third trial concerned the issue, the bona fides of the seniority system, before this Court.

The original complaint was filed on October 19, 1971, pursuant to Title VII

1/ Accordingly, the issue of appropriate injunctive relief in this case is now moot, since no employee works at the plant. The case is not entirely moot since the class of black workers seeks monetary relief for earnings lost as a result of the discriminatory seniority system.

of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. §1981. App. 1-2.[2/] In the original complaint, the claims of discrimination were made against the Pullman-Standard Company and the United Steelworkers of America and its Local 1466, the bargaining representative of the majority of production and maintenance employees at the Bessemer plant. The complaint was amended in order to name the International Association of Machinists and its Local. JA 14-25.

At the pre-trial conference on June 4, 1974, the district court granted leave to add the Machinists as a defendant "insofar as the relief requested may involve or

---

2/ References are made to the opinions of the lower courts reproduced in the Appendix to the Petition for a Writ of Certiorari submitted by the Steelworkers.

infringe upon the provisions of such Union's collective bargaining agreement, it being noted, however, that no request for monetary relief is being sought against said Union." JA 29.[3/] The pre-trial Order further included as a trial issue the plaintiffs' claim that the seniority system unlawfully perpetuated discrimination because, inter alia, the "rights of transfer do not apply to jobs ... represented by the IAM." Id.[4/] At the

---

3/ Also, the district court determined "that this action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company as production or maintenance employees represented by the United Steelworkers." JA 28; see App. 124, n.20. The first EEOC charge which alleged a discriminatory operation of the seniority system and discriminatory job assignments was filed on March 27, 1967. App. 50 n.5.

4/ The Company erroneously maintains that the district court limited the senior-

opening day of trial, the district court noted that Local 372 of the Machinists "is the certified labor union at Pullman-Standard" and granted leave to add Local 372 as a defendant "for the limited purpose that a part of the relief sought by the plaintiffs may involve some modification to the collective bargaining agreement between the Machinists and the defendant company." JA 31. The IAM and Local 372 were represented by counsel throughout the district court litigation.[5/]

4/ Continued

ity issue to "the system ... in the Pullman USW contract." Brief 3. The Steelworkers wrongly state that the issue before this Court is "that the system maintained by the Company and USW violated these [fair employment] laws." Brief 3.

5/ In the district court, Mr. Falkenberry, formerly a member of one of the firms representing the Steelworkers before this Court (JA 28, 41), represented the IAM and its Local 372 as well as the

The initial trial, covering 16 days in 1974, proceeded "on the theory ... that a violation of Title VII could be shown by proof of a neutral seniority system which perpetuated the effects of pre-Act discrimination. Trial was conducted on such a limitation of issues, with consequent inattention by plaintiffs to possible evidence showing the seniority system to have been instituted or maintained contrary to Section 703(h)," (emphasis added). App. 46-47. In its September 1974 decision, the district court held that "[w]ith the limited exception of expanding somewhat eligibility to transfer rights ... the various claims and items of relief sought

---

5/ Continued

Steelworkers and its Local 1466. The IAM and its Local 372 were joined for injunctive relief only; apparently because this issue is now moot, these defendants have neither filed a brief nor entered an appearance in this Court.

by plaintiffs are due to be denied." App. 153-154.

In a unanimous opinion, the Fifth Circuit (Coleman, Clark, Gee, JJ.) held that the district court had misapplied the appropriate legal standards and had committed "patent inaccuracies" in its factual analysis. App. 89. The Court defined the nature of the "prima facie inquiry" on remand in order "to eliminate the likelihood" that "[e]rrors apparent in prior proceedings" would "recur on the reconsideration we now mandate." App. 90.

In February 1977, the district court held a two-day remand proceeding devoted primarily to the introduction of additional evidence regarding the assignment of employees, promotion of supervisors and statistics. The district court delayed ruling "in anticipation" of the Teamsters

decision. App. 48. Before the parties had an opportunity to present evidence pursuant to the standard for defining a bona fide seniority system prescribed by Teamsters, the district court held that the seniority system was lawful pursuant to the Teamsters standard. App. 51-58. The district court also ruled that Pullman-Standard had not discriminated in its selection of supervisors and, reversing its own 1974 finding, that after December 1966 the Company had not discriminated in making job assignments. App. 53-66.

Having had no opportunity to present evidence relevant to the standard established by Teamsters, the plaintiffs moved for a new trial.[6/] After grant-

---

6/ The plaintiffs also requested that the district court produce a "chart" which it had developed and upon which it relied. App. 53. The district court refused, App. 124, and the chart remains secret.

ing the motion, the court heard two witnesses at a short hearing lasting less than three hours.[7] However, voluminous docu-

---

6/ Continued

While the district court stated that the chart need not be produced, inasmuch as it merely summarized evidence already in the record, App. 45, the court of appeals found that there were unexplained and unexplainable inconsistencies between the district court's factual statements based on the secret chart and the record exhibits upon which the chart was supposedly constructed. App. 7.

7/ Only the plaintiffs called witnesses. Mr. Samuel Thomas, a black employee at the company since 1946, testified as to segregation in seating at the union hiring hall and at union-sponsored social activities as well as the racial composition of union officers and negotiators. The other witness Mr. Willie James Johnson, also a long-time black employee, testified regarding the segregation at the Company and union hall, the racial identity of various International Representatives and the handling of grievances regarding racial discrimination. Neither witness was subjected to extensive cross-examination and neither petitioner attacks the credibility of these witnesses. Transcript 1-67 (1978 Trial).

mentary evidence[8] was introduced regarding the development and maintenance of the seniority system from 1940 through the 1970s. After reviewing this "paper" record[9] the district court held that the seniority system "is 'bona fide' and that the difference in terms, conditions or privileges of employment resulting thereunder are 'not the result of an intention to discriminate' because of race or color," App. 44.

The Fifth Circuit (Wisdom, Roney, Hatchett, JJ.) once again unanimously reversed the district court. The appellate court ruled that the lower court had improperly applied legal standards, and

---

8/ The respondents introduced 112 exhibits and the Company and Unions introduced 27 exhibits.

9/ See United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966).

that "[a]n analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made," (footnote omitted). App. 15. The Fifth Circuit also reversed the lower court's rulings that the Company had neither discriminated in the selection of supervisors nor in post-1966 job assignments, App. 7-8, 16-21. The Company's petition for a writ of certiorari was denied insofar as it sought review of the Fifth Circuit's ruling regarding the selection of supervisors and the assignment of employees.

B. Facts

Overview. The proper presentation of the legal issue in this case requires a description of the general racial policies

of the defendant Company and Unions, the accumulated racial impact of the decisions made by the defendants in developing the seniority system, and the specific racial impact of particular decisions made by the defendants. The evidence demonstrates that each of the defendants had blatantly racist policies, that the overall impact of the seniority system had substantially adverse consequences for black workers, and that specific decisions made by the Company and Unions tended to segregate further the plant and to limit the job opportunities of black workers.

1. Racial Policies of the Company and Unions

a. Pullman-Standard. The evidence is undisputed that the Company considered the race of an employee in practically every decision which it made in its Bessemer plant:

Both in 1941 and in 1954, racial segregation was extensively practices at the Company's Bessemer plant .... Bathhouses, locker rooms, and toilet facilities were racially segregated. 10/ Company records -- including employee rosters, 11/ internal correspondence, 12/ records of negotiation sessions, 13/ list of persons picketing 14/ included racial designations. In 1941 some of the "mixed" jobs even had different wage scales for whites and blacks. 15/ All company officials, supervisors and foremen were white ... (Footnotes added). App. 39, 13.

10/ The facilities remained segregated until 1967. JA 97.

11/ Employee identification numbers between 100 and 199 and between 300 and 1999 were given to black employees and employee identification numbers between 200 and 299 and 2000 and above, were given to white employees. JA 104; see Record, plaintiffs' exhibit 1 (1978 Trial).

12/ See e.g., JA 209-11, 220-11, 220-21, 223-27.

13/ See e.g., JA 208, 212-13, 222, 254, 256, 268, 270.

14/ See e.g., JA 219, 224-27, 255.

15/ JA 216-17, 220, 223, 252-53.

The jobs at the plant were segregated:[16] "Most of the jobs at the plant were by custom treated as 'white only' or 'colored.'" App. 39. At least until 1971 the Company maintained its discriminatory job assignment policies.[17] App. 162-63.

b. Steelworkers. As did the Company, the Steelworkers operated on

---

16/ "Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated ...." App. 121 n.12, 71.

17/ As a result of an arbitration decision in March 1965 the practice of job segregation was breached. App. 55. This decision applied to one job, rivet driver. While it provided a "ground breaker" for ending strict job segregation, JA 53, the discrimination in job assignments did not end, as the Steelworkers allege, with the March 1965 arbitration decision. Brief 6, nn.9, 15. Both the district court in its 1974 decision and the Fifth Circuit in its most recent decision concluded that discriminatory job assignments continued after the March 1965 decision. App. 54-55.

a segregated basis.[18] "[R]acial segregation was extensively practiced ... in the local union hall ... Union meetings were conducted with different sides of the hall for white and black members,[19] and social

---

18/ The Steelworkers stress that their "performance in general" was supportive of the economic rights of black workers. Brief 10 n.20. But see, W. Gould, Black Workers in White Unions at 397 (1977). It is not the general performance of the Steelworkers that is at issue in this case; rather, it is their practices at the Bessemer plant. As shown in the discussion in this section, the practices of Local 1466, Steelworkers, divided and segregated the membership during the period of the development of the seniority system.

19/ The Union maintained segregated seating at meetings until the first trial in this case in 1974. JA 92-93. The Union president, Mr. Henn, "said [the black workers] there is a white side and a black side." JA 94. The Steelworkers' assertion that "the record is not clear" as to whether [the segregated seating was] by mandate or personal choice," is error. Brief 12, n. 21.

functions of the union were also segregated." (Footnote added) App. 39. The Union maintained segregated restroom facilities in the meeting hall until 1967,[20/] and only integrated its facilities at the same time that the Company integrated its facilities. JA 96-97.

Since 1940 blacks have constituted a significant proportion of the membership of Local 1466 and blacks have served in certain officer positions. However, it is apparent that until 1970 black workers occupied only two elected positions, Vice-President and Financial Secretary, while white workers occupied the other three positions, President, Trea-

---

20/ The Steelworkers concede that there were "separate washrooms at the local union hall into the 1960's." Brief 12.

surer, and Recording Secretary.[21] More importantly, during the the 1950s and early 1960s white union officials dictated that racial grievances would not be prosecuted, and black union officials would acquiesce by agreeing that "it wasn't time for it."[22]

21/ Company Exhibit 309 shows this division of positions from 1965 through June, 1970. JA 69-80. Furthermore, uncontested testimony makes clear that the same racial allocation of positions existed in 1946, JA 51-52, that "in the fifties there were blacks who served as vice president and secretary", JA 94, and that the first black served as President in 1970. JA 98.

22/ Willie Johnson, a black steward in the Paint Department from 1967 through 1973 testified as follows:

"A. In '63. And we had questioned the president about segregated job assignments at the plant. And he would always tell us, well, we have got white [32] jobs because you're going to stay on the black jobs, and the whites are going to maintain the white jobs. So about March of 1963,

The Steelworkers assert that during "the 1940's the Union maintained the ob-

---

22/ Continued

thirteen black employees were dropped, laid off, I mean, and thirteen junior whites remained in the plant. So we thirteen black employees filed a thirteen grievance saying the company was discriminating. And when we came to the union meeting that Tuesday night, the president, when he called the meeting to order, he had the thirteen grievances. And he held them up in his hand, and he said, I have thirteen grievances here, racial grievances that have been filed by thirteen black employees out in the plant against the company. And he criticized those thirteen black employees for filing such grievance. And I want the rank and file to tell me whether or not to tear these grievances up or process them. Well, one white man got up and made a motion that he tear them up. But we had the majority that night of blacks, and we voted it down, and made a motion to process the grievances. And we did win the vote. But the president did not process the grievances. And later we went to the National Labor Relations Board and filed discrimination charges there. At that same night the secretary was Gus Dickerson. [33].

Q. Was Gus Dickerson a black man?

ject of removing the inequity of black workers being paid less than whites for the same job." Brief 12, n. 21. This objective was advanced at one meeting, JA 216-17; the Company's documents make clear however that it was the black workers in Steelworkers Local 1466 who were advancing this matter with little support from the

---

22/ Continued

A. Yes, he was a black man. But he got up and told us he was not going to process a racial grievance. It wasn't time for it, and he wasn't going to do it.

Q. In your occupation as a member of the union during the fifties and early sixties, Mr. Johnson, did the black union officials press racial grievances or complaints of racial grievances at this time?

A. No. They would always say there wasn't time for it." JA 97-98.

The evidence contradicts the Steelworkers' assertion that "on no occasion did the vote on contract proposals divide along racial lines." Brief 12, n. 21.

white union members. For example, a 1945 Company memorandum indicates that

> there is now a very active movement on the part of the colored to push themselves to a point of doing the same job as the white man. This has been confirmed to me by the fact that representatives of the C.I.O. have stated to me [W. C. Sleeman, a company official] that they are having trouble all over the district with their colored membership to the extent that in some of the plants numbers of the colored have walked off the job.... We also know that in numerous meetings we have had recently the colored representation always inject negro differentials and that they should be permitted to have negro leaders over the negro man. JA 216-17. 23/

c. Machinists. During the period when the Machinists' bargaining unit was defined at the Bessemer plant, 1940 through

---

23/ Similarly, in a 1951 Company Memorandum, a manager observes that "[w]e are inclined to think that the committee as a whole, with the exception of the colored, are not so interested in the wage inequity program as much as they are in a good

1944, see section 2. b, infra, the Machinists through their Ritual limited membership to "qualified white candidates." JA 348, 350.[24/] At the 1941 NLRB hearing regarding union representation at the Bessemer plant, a representative of the

---

23/ Continued

substantial increase in money." JA 223. Also another Company Memorandum indicates that after a Company offer was made during negotiations for the 1947 agreement "several of the colored objected to it, stating that they wanted certain inequities corrected." JA 220.

24/ The plaintiffs had requested the district court to take judicial notice of this adjudicative fact. JA 346-50. The district court declined the request. App. 24 n.1. In United Steelworkers of America v. Weber, 443 U.S. 193, 198 n. 2 (1979), the Court took judicial notice of discrimination by craft unions. See M. Karson and R. Radosh, The American Federation of Labor and the Negro Worker, 1894-1949, in J. Jacobson, ed. The Negro and the American Labor Movement at 155-159; (1968); H. Northrup, Organized Labor and the Negro at 2-3, 9-10, 254 (1944).

Steelworkers stated that "it is my information that they [black workers] cannot belong [to the Machinists]." JA 145.[25/] Colon Clemons, a white employee who had progressed from a laborer to a machinist and then to a supervisor in the Tool and Die Department represented by the Machinists, testified that he joined the Machinists in 1941, that there were no black members of the Union at that time, and he could not recall ever seeing a black at a Machinists' meeting. JA 339-40. In 1941,

---

25/ The Trial Examiner halted "this line" of questioning regarding race. The representative of the Machinists had asserted at the hearing that the Union "claim[ed]" "negro cranemen", JA 149, see Company Brief 5. In fact, the only crane operator position was located in the Steel Miscellaneous Department, which was staffed by a black employee, see plaintiffs' exhibit 109 (1978 Trial), JA 243-51; see also plaintiffs' exhibit 1 (1978 Trial). The Machinists did not seek to have this crane operator position included in their bargaining unit.

the Machinists did not petition the NLRB to represent any jobs that were staffed by blacks, despite the functional relationship of such jobs to other jobs included in their petition. Then they entered into a series of agreements that removed all jobs staffed by blacks which had been included in their bargaining unit by the NLRB. See section 2. b, infra. After this job switch, a black worker did not enter the Machinists' bargaining unit until 1970.[26/] App. 7.

26/ It appears that after 1943 four blacks were assigned to the welder helper job in the IAM unit. JA 255; Plaintiffs' Exhibits 2, 62 (1978 Trial). This position was not staffed at the time of unionization, and no blacks were in the IAM unit. JA 247. However, in May 1944 the job was ceded to the Steelworkers as part of the acquisition of three IAM departments by the Steelworkers. See n. 41 infra.

2. Recognition of Unions and Plant Division

a. Structure Prior to Union Certification. Pullman-Standard opened its Bessemer plant in 1929. Until the plant closed in January 1981, the Company built railroad cars in Bessemer. Production of the cars was based upon the receipt of special orders, which could range from a few cars to several thousand. Depending upon the size of the orders, the number of workers at the plant varied from several hundred to several thousand. App. 118-19 nn.3-4, 68 nn. 2-3.

In 1941 four unions sought to represent employees at the Bessemer plant.[27/]

27/ The Steelworkers sought to represent all the production and maintenance employees, while the Machinists and the International Brotherhood of Electrical Workers (IBEW) sought to represent specified units.

At this time the Company had approximately 1300 employees divided into twenty departments.[28] Of these departments, five contained employees of only one race. The Lumber Yard, Welding, Template and Plant Protection had only white workers, and the Truck Shop had only black workers. JA 103.

b. Certification of the Bargaining Units. The major focus of the 1941 NLRB hearing concerned the proposed unit which the Machinists sought to repre-

---

27/ Continued

The Federal Labor Union sought to represent those production and maintenance employees excluded by the Machinists and the IBEW. JA 155.

28/ The "voting list" which was submitted to the NLRB listed 21 departments. JA 103. However, one department, Sand Blast, had no employees and does not appear on subsequent seniority lists. The voting list racially identifies employees. JA 104, plaintiffs' exhibit 1 (1978 Trial).

sent. See JA 105-49.[29] There are two critical aspects to IAM's representational claim: the Union sought to represent production as well as craft workers[30] and the Union selected jobs on the basis of the race of the job incumbents. For ex-

---

29/ Although the district court stated that "the objective facts are not greatly in dispute," the court failed to describe these facts since it determined as a matter of law that the motivation of the IAM was irrelevant to the bona fides of the system. App. 42. The Fifth Circuit disagreed; "[T]he motives and intent of the IAM in 1941 and 1942 are significant in consideration of whether the seniority system had its genesis in racial discrimination. The IAM was one of the unions which unionized the company in 1941 and the evidence reflects that the IAM manifested an intent to selectively exclude blacks ...." Id., 14. See Argument, sections B. 2 and 5. infra.

30/ The Company mistakenly claims that the IAM only sought a "craft" unit of skilled workers and apprentices and helpers ...." Brief 3. The Steelworkers implicitly concede that the 1941 bargaining unit of the IAM included production jobs. Brief 24-25 n. 39.

ample, the IAM petitioned for the inclusion of cranemen in the Die and Tool and the Wheel and Axle departments, staffed only by whites, but not in the Steel Miscellaneous department, staffed with a black, JA 149, 155, 170, 247, 249, 251,[31/] and for the inclusion of handyman in the Die and Tool department, staffed only by whites, but not in the Maintenance department, staffed with a black, JA 155, 170, 249, 250. Also, the IAM requested that the following production jobs, as distinct from craft jobs, be included in its unit: "production ... welders" JA 155, 170,

---

31/ Plaintiffs' exhibit 109, (JA 243-51) lists the racial composition of each job at the time of the certification decision. This exhibit was prepared from plaintiffs' exhibit 1 (1978 Trial). (The cover page of Plaintiffs' exhibit 1, a summary of the exhibit, contains some numerical inaccuracies, and the specific department listings should be examined.) The IAM did not claim all cranemen positions which were staffed by whites. JA 241, 246, 248.

117, production pipe fitters, JA 155, 170, see 127-29,[32] "wheel borer", JA 136-37, 155, 170, "tool grinder," id., and "axle finisher", id.[33] All these positions

---

32/ The IAM sought to represent "employees in the air-brake department," JA 155 or, as later amended, "air brake production employees classified as pipe fitters, pipe fitter helpers, and air brake testers," JA 170. The plant manager, Mr. Sleeman, testified that these air brake production employees are "just a part of [the] ... production line," that they are part of the Steel Erection department, and that "[the Company does] not classify them as maintenance pipe men." JA 127-29.

33/ Mr. Howard, the Machinists' representative, JA 106, stated that "we claim" the employees in the borer, grinder and axle finisher positions in the Wheel and Axle department. JA 134-37. These were production workers. When asked whether these employees "are machinists," the plant manager replied "[a]bsolutely not, because we have taken a man right from the farm, and he is the best production man we ever had there...." JA 137. In reply Mr. Howard admitted that the jobs being sought by the IAM were not highly skilled: "I also appreciate the fact that you can take a chimpanzee and show him the opera-

were staffed exclusively by white workers. JA 246-47. The IAM did not seek to include in its unit other machine operator positions, like those in the Punch and Shear Department, JA 245, which were staffed with black employees.

Despite the attempts of the IAM to exclude from their bargaining unit any jobs to which blacks were assigned, the NLRB certification decision included jobs staffed by black workers within the Machinists' unit. Since the IAM had expressly requested some production jobs and expressly excluded only one job[34/] in the Wheel

---

33/ Continued

tions in some of these departments and then put him on a chain where he cannot run away, and probably he can do that [the job]...." Id.

34/ Mr. Howard, the IAM representative, stated "I don't claim the hookers any-

and Axle department, the NLRB included in the IAM unit all jobs in that department and in the Truck department, JA 165-66, which were functionally related to the Wheel and Axle department. JA 119, 130-31. As a result 24 blacks, 14 in the Truck department and 10 holding four jobs in the Wheel and Axle department, JA 247, were placed in the IAM unit.[35/]

Within a month of the NLRB November 1941 certification, the Steelworkers and

---

34/ Continued

where." JA 149. The hooker assists cranemen, JA 125. The Machinists sought to represent several craneman positions, yet they rejected inclusion in the unit of the functionally related job of hooker. The job was generally staffed, as in the Wheel and Axle department, with black employees. JA 247.

35/ The Machinists made clear to the Company that "they do not want [these employees]" but if necessary "they will accept them." JA 207.

the IAM agreed to a swap of jobs which removed all jobs staffed by black employees from the IAM unit and transferred two jobs staffed by two whites from the Steelworkers' to the Machinists' Unit. Compare JA 170-71 with JA 165-66.[36/] The Company endorsed the agreement, and it was included in the April 1942 collective bargaining agreements between the Company and the IAM, JA 167-71, and between the Company and the Steelworkers, plaintiffs'

36/ The agreement excluded crane hookers, wheel rollers and laborers and the Truck Shop from the IAM unit. All the 24 black employees in the designated IAM unit were in wheel roller, wheel roller helper or laborer positions or in the Truck Shop. JA 247. In return, the jobs of toolroom man and toolroom helper in the Steel Erection department, which were staffed by two white employees, JA 246, were transferred from the Steelworkers' to the Machinists' unit.

Exhibit 33 (1978 Trial).[37/]

As a result of the gerrymandering of the plant between the Machinists and the Steelworkers, the number of one-race departments increased from five to ten. Of the five all-white IAM departments, Tool and Die, Wheel and Axle, Air Brake, Millwrights (Maintenance), and Welders, JA 167, all, except Welders, had included employees

---

37/ The Steelworkers claim that this transfer "contract[ed] ... the IAM unit to craft and highly skilled jobs." Brief 24-25, n. 39. In fact, (1) the jobs remaining in the IAM unit were not all "highly skilled" or "craft," see nn.32, 33, supra; (2) the jobs removed from the IAM unit were functionally related to those that remained and required equal skill (see JA 119; 130-31 describing the Truck shop and Wheel and Axle department); and (3) the Steelworkers transferred two jobs in a production department, Steel Erection, to the IAM's unit, see n.36, supra. In keeping with their policy of limiting their membership to "white males," the Machinists simply "did not want" the black employees, see n.35, supra.

of both races prior to unionization.[38/] In addition, to these four new one-race departments, an all-black Die and Tool department was created in the Steelworkers' unit. The district court stated with respect to the creation of two Die and Tool and two Maintenance departments that "[n]o similar situation exists at Pullman's Butler and Hammond plants, and indeed there was no such division at Bessemer prior to unionization and seniority." App. 35. The

---

38/ Die and Tool: The jobs staffed by blacks, hooker, and laborer were excluded from the IAM unit. JA 166, 170, 249. Maintenance: All the jobs selected for inclusion in the IAM unit from the Maintenance department were staffed by whites. JA 166, 170, 250. Air Brake: The jobs of pipefitter and pipefitter helper in the heavily black Steel Erection department and of air brake tester in the Shipping Track department, which were staffed by whites, were joined to form the Air Brake department in the IAM unit. JA 166, 170, 245-46, see n.32, supra. Wheel and Axle: Jobs staffed by whites were included in the IAM unit; those staffed by blacks were excluded. JA 237, n.36, Appendix A, para. A.

same observation is equally true with respect to the creation of separate all-white Air Brake and Wheel and Axle departments.

3. Development of the Seniority System

a. Division of Bargaining units. Both the Steelworkers and the Machinists entered into initial collective bargaining agreements with Pullman-Standard on April 7, 1942. Plaintiffs' exhibits 17, 33 (1978 Trial). The seniority agreements applied only to departments or jobs within the bargaining unit for which those unions were "recognized as the exclusive collective bargaining agent." The agreements did not provide any "seniority" rights for employees who transferred from one bargaining unit to another bargaining unit. An employee who transferred from the Steelworkers' to the Machinists' unit

would start as a "new man"; in effect, the worker who transferred bargaining units forfeited all job security.[39] The division of the plant into bargaining units seriously affected the employment opportunities of workers. As a practical matter, a worker would spend his entire career, unless he progressed to management, in the jobs of one bargaining unit.[40]

39/ The 1956 agreement between the Steelworkers and Pullman-Standard made this forfeiture provision explicit and clearly applicable to all transfers, even those instituted by Management: "An employee hereafter transferred to a position outside of the bargaining unit ... shall lose his seniority in the bargaining unit at the time of such transfer." JA 194. See also n. 45, infra.

40/ For example, white employee Colon Clemons testified that he entered the IAM's Die and Tool department as a laborer and progressed to craneman and machinist. JA 339. The seniority lists introduced into evidence show other similar job

Since the Machinists and the Steelworkers continued to represent employees in separate bargaining units until the plant closed in January 1981, the effects of the 1941 racial gerrymandering of bargaining units continued for four decades. Although the IAM bargaining unit was modified in 1944,[41] the IAM continued to represent employees in two departments, Maintenance and Die and Tool, until the plant closed. These departments remained all-white until 1970. App. 7.

40/ Continued

progressions and the general restriction of employees to one bargaining unit. See plaintiffs' exhibits 2-8 (1974 Trial), plaintiffs' exhibits 2-12 (1978 Trial).

41/ The IAM agreed to the transfer of the jobs in three departments, Welding, Air Brake, and Wheel and Axle, to the bargaining unit of the Steelworkers. JA 174-76.

A final change in the 1941 bargaining unit division at the plant occurred in 1946 when the jobs originally represented by the IBEW, were transferred into the bargaining unit represented by Local 1466 Steelworkers.[42/] App. 41, JA 298-304.

b. Application of the Seniority System Within the Steelworkers' Bargaining Unit. Initiated in the proceedings to unionize the plant in 1941, the seniority system continued to develop until 1954 when it reached the form it retained until the plant closed. "The division of the plant's work force into twenty-eight separate seniority units - 26 USW Units and

---

42/ The International Brotherhood of Electrical Workers had been certified as the representative of two small groups of employees, electricians and powerhouse operators. App. 36, JA 165.

2 IAM units - has remained essentially unchanged since 1954," (footnote omitted).[43] App. 31. The importance of seniority within the Steelworkers' unit increased substantially after 1954 because (1) the scope of seniority was broadened from "occupational" to "departmental;"[44] (2) the discretion of the Company to transfer an em-

---

43/ Since blacks were excluded from the Machinists' bargaining unit, the exercise of seniority rights of employees within that bargaining unit are not directly relevant to the issue before the Court. However, obstacles to transfer into the bargaining unit are directly relevant. See section a, supra.

44/ The first collective bargaining agreement between Pullman-Standard and the Steelworkers, signed in April 1942, provided for "departmental" seniority: "No employee shall hold seniority in more than one department ...." JA 181. In 1947 the seniority criterion was changed to "occupational": "Occupational seniority within a department will prevail for all employees ...." JA 189. In 1954 the parties reverted to the use of departmental seniority. JA 194.

ployee of the Company to transfer an employee without any loss of seniority to the employee was restricted;[45/] and (3) the use of seniority was extended from the determination of layoff or recall during an "increase or decrease of forces," JA 180, 182, 184, 188, to the determination of promotions. JA 201-02.

The expansion of seniority rights was preceded in 1953 and 1954 by numerous departmental readjustments, which, like the

---

45/ In 1944, the collective bargaining agreement was modified to provide that if the Company transferred an employee because of "exceptional ability" he could continue to accumulate seniority in two departments. JA 185-86. The provision also applied during the period, 1947-1954, when occupational seniority was used. JA 189-90. In 1954 the provision was severely limited by, inter alia, requiring Management to "return" the transferred employee "within a period of one (1) year from date of transfer to his original department ...." JA 194-95. See also n.39, supra.

departmental changes during unionization, increased the number of one-race departments. Since 1952 the negotiation positions of the parties had indicated that a return to departmental seniority was likely. In August 1952, the Steelworkers proposed that they negotiate a company-wide, master contract with Pullman-Standard. JA 286. At that time the Company had four plants where employees were represented by the Steelworkers, two had departmental seniority, one had plant seniority, and one (Bessemer) had occupational seniority. App. 33; 189, 278-85. The "company ha[d] established by ... contemporaneous studies made by it at the time of contract negotiations -- [that] seniority by departmental age ... was the modal form of agreements generally. ..." App. 33.

Several earlier departmental changes had little effect upon the seniority or employment opportunities of the workers who were protected at the time by occupational seniority only.[46/]

46/ The Electrical and Powerhouse departments were moved in 1946 from the defunct IBEW Unit to the Steelworkers. Three departments, Air Brake, Welding, and Wheel and Axle were transferred in 1944 from the Machinists to the Steelworkers. By 1947, Air Brake, Electrical, Powerhouse, and Wheel and Axle departments were reabsorbed in the departments they had been in before unionization. Plaintiffs' exhibits 1 and 2. (1978 Trial). The Welding department remained separate. Id. In the "late 1940's" the Company created a separate Inspection department staffed by white workers only. App. 32.

The record contains the departmental seniority lists from 1947 through 1954, plaintiffs' exhibits 2 through 9 (1978 Trial). From these lists it is possible to ascertain the departments, the jobs in the departments and the race of the employees in those jobs and departments. The race can be determined because the employee's number indicated his race, see n.11, supra. It is not possible to ascertain

In 1953 and 1954, just before the switch from occupational to departmental seniority, seven new one-race departments were created within the Steelworkers' bargaining unit: Air Brake Pipe shop, Boilerhouse, Die and Tool, Janitors, Plant Protection, Powerhouse, and Steel Miscellaneous.[47/] Four of the depart-

---

46/ Continued

from the record whether from 1944 through 1946, the three former IAM departments or whether in 1946 the two former IBEW departments remained separate departments within the Steelworkers' unit or were reabsorbed into other departments in the Steelworkers' unit. The district court's assertions as to the status of the departments at this time, see App. 41, 37 n.19, do not have record support. The chart prepared by the company and introduced as exhibit 27, JA 336, which purports to show the departmental changes at the plant, is riddled with errors. See Appendix A to this brief.

47/ Six of these departments were created in June 1954 -- just two months prior to the return to departmental seniority. Compare plaintiffs' exhibits 8 and 9.

ments contained only white employees: Air Brake Pipe shop, [48] Boilerhouse, Powerhouse, [49] and Plant Protection. Three of the departments contained only black employees, Die and Tool, [50] Janitors, [51] and

---

48/ Jobs in the Air Brake Pipe shop were functionally related to jobs in the integrated Steel Erection department, see n.32, supra. Nevertheless, several jobs, staffed by white employees only, were removed from this department in order to form the Air Brake Pipe shop. Compare plaintiffs' exhibits 8 and 9.

49/ The Boilerhouse and Powerhouse departments were removed from the Maintenance department. The Powerhouse jobs had been in the Maintenance department prior to unionization and during the period when occupational seniority prevailed in the Steelworkers' unit. The Boilerhouse had always been located in the Maintenance department. See n.46, supra; JA 243-51.

50/ The Die and Tool (CIO) department was staffed entirely by black employees after unionization, see p. 33, n.38. However, by 1947 the position of Welder, staffed by

[Continued]

[51/ on next page]

Steel Miscellaneous.[52] Therefore, coincidentally with the establishment of depart-

---

50/ continued

whites, had been added to this department. Plaintiffs' exhibit 2. In 1953 there were two whites, Moreland #2448 and Thompson #2447, in the Welder job. In 1954 these positions had been moved to the Welding department and the Die and Tool (CIO) department was resegregated. Plaintiffs' exhibits 8 and 9.

51/ The court of appeals correctly summarized the history of the Janitors department: "between 1947 and 1952, the all-white watchman and all-black janitors were both in the Safety department. The 1953 seniority list carries both jobs under a Plant Protection department. The 1954 seniority list shows the janitors in an all-black Janitors department and the watchmen in an all-white Plant Protection department." App. 12; see plaintiffs' exhibits 2-9.

52/ In 1953 the Steel Miscellaneous department was separated from the Steel Stores department. Plaintiffs' exhibits 7 and 8. See also Appendix A, paragraph G. The district court finding that the two units "had roughly comparable racial compositions" is misleading. App. 31-32. In 1953 the Steel Stores department contained 5 white and 26 black workers.

mental seniority and with the increase in the importance of seniority and the departmental structure, a substantial number of one-race departments were created in the Steelworkers' unit.

4. Operation of the Seniority System After 1956. The departmental and bargaining unit structure which had evolved by 1954 remained "essentially unchanged."[53/] App. 31, 3. The depart-

---

52/ Continued

Plaintiffs' exhibit 8. However, all the production employees in the Steel Miscellaneous department were black. While the seniority list shows 2 whites out of the 64 workers in the Steel Miscellaneous department, it is critical to note that those two white workers were "leaders" or "foremen A." Plaintiffs' exhibits 8, 11. In keeping with the policy of placing only whites in supervisory positions, see section B. 1. a, supra, the two supervisors in the department were white.

53/ The Boilerhouse department in the Steelworkers' unit was closed in 1964.

ments and their racial composition in 1956 and 1964 are listed in Appendix B to this brief. Apart from a limited order entered by the district court in 1974, see n.62, infra, the application of seniority remained essentially the same as established in the mid-1950s. In brief, there was no provision for transfer between bargaining units and an employee forfeited seniority if he transferred between bargaining units or between departments within the Steelworkers' unit. App. 119-20, 26, see also section 3, supra. The district court correctly characterized the effect of the seniority forfeiture provision as a

---

53/ Continued

App. 31, n. 5. Also by 1964 the Shipping Track and Paint departments had been merged. See Tables 1 and 2, Appendix B.

"no-transfer rule." App. 30;[54/] see also App. 3.

In 1968 the Company entered into negotiations with the Office of Contract Compliance, Department of Labor. These negotiations led "to a conditional memorandum of understanding designed to enhance opportunities for blacks," (footnote omitted). App. 122. The conditional memorandum included "transfer rights with seniority carryover for black employees" from certain "low-ceiling" departments to "formerly all-white departments." App.

54/ While there was no express bar to interdepartmental transfer, because of the seniority forfeiture provision, the system in effect "locked" employees into the department or bargaining unit to which they had been assigned. "In any industry loss of seniority is a critical inhibition to transfer," United States v. Jacksonville Terminal Co., 451 F.2d 418, 453 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

122 n. 15. The memorandum was rejected by the unions and never went into effect. App. 122, 136 n. 32; JA 41-42. In 1972 the Company once again entered into negotiations with the Office of Contract Compliance. On this occasion Pullman-Standard signed an agreement which was "to serve as a corrective action program." App. 6. The agreement provided limited transfer rights to certain black employees.[55/] Once again, the Steelworkers and Machinists failed to sign the agreement, App. 123 nn.17-18. Although the district court concluded that,

---

55/ "Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments ... and those hired before April 30, 1965, who had been assigned to four 'low-ceiling' departments are given preference for vacancies arising in any of the departments." (Footnote omitted). App. 123.

despite their failure to sign, the Unions "apparently" agreed to accept its terms, id., the court issued an order declaring the agreement "binding upon the union defendants." App. 154.[56/]

5. Racial Impact. The district court concluded "that for each of the years 1967 through 1973 there were variations in the racial composition of the departments beyond that expected from random, 'color-blind' selection." App. 52. The court attributes this disparity to actions taken "prior to Title VII [enacted in July 1964, effective as of July 1965]." Id.[57/]

56/ The district court vacated this 1974 order when in 1977 it ruled that the seniority system was lawful and entered judgment for the defendants. App. 148.

57/ In order to support its conclusion, the district court stated that it had prepared a chart regarding post-1966

The district court never evaluated the severity of the "variations in the racial compositions of the departments." In fact, as of 1964 the overwhelming majority of employees at the Bessemer plant were located in racially identifiable departments: departments where there was a "serious disproportionality" in the racial composition of employees.[58/] In 1964[59/]

57/ Continued

departmental assignments. The court did not reproduce the chart in its opinion, App. 53, and refused the plaintiffs' request, made in a motion to amend the judgment, to produce the chart. App. 45. The conclusion based upon this secret chart, that post-1966 departmental assignments were not being made in a discriminatory manner, was reversed on appeal, App. 78,and this issue is not before this Court.

58/ The determination of "serious disproportionality" is based upon this Court's analysis in Hazelwood School District v. United States, 433 U.S. 299, 311 n. 17

[Continued]

[59/ on next page]

there were 3875 employees in 28 departments in the Bessemer plant. Of these employees, 3727 or 96% were located in racially identifiable departments; 1274 or 96% of

---

58/ Continued

(1977). A detailed description of the methodology is incuded in Appendix B.

59/ The source for the distribution of employees in 1964 is the seniority list for that year which was introduced in the 1974 trial as plaintiffs' exhibit 2. The district court relied on this exhibit in constructing a chart for the year 1965. App. 127-28 n. 27. As the district court observed, there was no seniority list introduced for the year 1965, but the court determined that the "functional equivalent" of the 1965 list could be determined "by taking account of the additions and deletions" to the 1964 list. App. 120 n. 10. In this brief, the respondents used the same source as the district court, plaintiffs' exhibit 2 (1974 Trial), but we have indicated that the employment totals are for "1964," the year by which the seniority list is designated. Regardless of whether a designation of "1964" or "1965" would be more correct, the data reflects the employment composition at the plant on or near the effective date of Title VII.

the 1325 black employees and 2453 or 96% of the 2550 white employees were in racially identifiable departments.[60/] Appendix B, Table 1. The same analysis for 1956, the date when the seniority system had fully evolved, shows that the racial impact of the system was firmly established at that time -- over 85% of the employees were in racially identifiable departments. Appendix B, Table 2.

Despite the substantial racial allocation of employees by department, the

---

60/ Nineteen of the twenty-eight departments in 1964 were racially identifiable, according to the statistical analysis in Castaneda and Hazelwood, since there was a "serious disproportionality" in the racial composition of these departments. See Appendix B. In addition to these 19 departments, there were an additional three departments which had historically been staffed entirely by white employees, Boilerhouse, Powerhouse and Template. See n.87, infra.

Steelworkers and the Company repeatedly assert that the "vast majority" of employees were in "racially mixed" or "integrated" departments. Steelworkers 6-7, 14-15, 27-28, 8a-11a, 20a-22a; Company Brief 10, 14, 42. The petitioners' use of the term "integrated," regardless of the disproportionality of the racial composition in a department, distorts the actual racial staffing of departments.

The racial staffing of departments and the "lock-in" effect of the seniority system had a serious adverse impact on the earnings of black employees. In 1964, 8 of the 28 departments had a median job class[61/]

61/ In the collective bargaining agreements between the Steelworkers and Pullman-Standard, jobs are placed within "job classes." The job classes range from 2 through 20, with 20 being the highest paid. The base hourly wage, incentive and non-

of 10 or above, thirteen departments had median job classes between 5 and 7, and seven departments had median job classes below 5. Appendix B, Table 3. Of the 2545 white employees, 1959 or 76.9% were in the eight departments with a job class median of 10 or above, whereas only 230 or 17.3% of the black employees were in these departments. In the "low-ceiling" departments, those with a job class median below 5, the racial proportion was reversed: 433 or 21.9% of black employees, whereas only 177 or 5.7% of white employees were in these departments. Id.

61/ Continued

incentive, for a job is determined by its job class, see e.g., 1965 Collective Bargaining Agreement, Company exhibit 263 (1974 Trial). The "job class (JC) level ... determines [a job's] relative ranking in base pay in comparison to other jobs," although piece-rate scales may play a role in the actual earnings potential of a particular job. App. 119 n. 8.

The continuing economic effect of the seniority system is illustrated by the disparity in the job class levels of black and white employees who were employed in 1973 in the Steelworkers' bargaining unit and who had more than 6 years of seniority: 551 or 74% of all black employees as compared to 119 or 16% of all white employees earned less than $4.25 an hour, job class 8 or below. JA 65. Moreover, 634 or 81% of all white employees as compared to 192 or 20% of all black employees earned more than $4.40 an hour, job class 10 or above. Id. The average hourly base rate for black employees in the Steelworkers' unit was $4.14 as compared to $4.45 for white employees. Id.

The historical exclusion of blacks from the IAM bargaining unit had a substantial adverse economic impact on blacks.

The two IAM departments, Maintenance (IAM) and Die and Tool (IAM) provide some of the greatest earnings opportunities at Pullman-Standard. Appendix B, Table 3. Of the 139 employees in the IAM unit as of June 1, 1972, 11 were black. No black in the unit had a seniority date earlier than 1971. The average hourly base rate of all employees was $4.57 an hour.[62/] In the

---

62/ Plaintiffs' Exhibit 9 (1974 Trial) includes a seniority list of the two IAM departments as of June 1, 1972, from which can be computed the number of employees in each job. The above employee totals include only those employees who were in the IAM bargaining unit as of the date of the seniority list, June 1, 1972.

For each of the jobs in the IAM unit, the wage rates used were those in effect from October 1972 until October 1973. Those rates appear in the IAM 1971 collective bargaining agreement with Pullman-Standard. Plaintiffs' Exhibit 31 (1978 Trial). The 1972 IAM wage rates are used since the last complete IAM seniority list is a 1972 list. Where the hourly rates

Die and Tool (IAM) department where there were 67 whites and 5 blacks, the average hourly base rate was $4.52; in the Maintenance (IAM) department where there were 61 whites and 6 blacks the average hourly base rate was $4.62. The average hourly base rate of employees in the IAM bargaining unit exceeded that of blacks in the USW unit by at least $.43 per hour.[63/]

SUMMARY OF ARGUMENT

I.

A. "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended

---

62/ Continued

indicate a pay range for a particular job, the median rate for that job was used which rate was then multiplied by the total number of employees in that job.

63/ This figure understates the disparity in wage rates between blacks in the USW unit and workers in the IAM unit because 1973 wage rates are used for the USW unit and 1972 rates for the IAM unit.

to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976). In Pullman-Standard's Bessemer plant, as in other plants, particularly in the South, practices of racial gerrymandering and manipulation of seniority systems were common. The protection in Section 703(h) for "bona fide seniority systems" must not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures, or tests' that disproportionately affect members of those groups that the Act protects." California Brewers Association v. Bryant, 444 U.S 598, 608 (1980).

B. Section 703(h) "does not immunize all seniority systems. It refers only to 'bona fide systems'...." International Brotherhood of Teamsters v. United States, 431 U.S. 324 at 353 (1977). A seniority system is not bona fide and thus not lawful if its genesis, maintenance, or operation was affected by intentional discrimination. In "[d]etermining whether invidious discriminatory purpose was a motivating factor [it is necessary to make] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Corp., 429 U.S 252, 266 (1977).

Like other provisions of section 703(h), the provision immunizing discrimination -- the provision immunizing "bona fide seniority systems" creates an affirma-

tive defense by which an employer or union may demonstrate that its system is bona fide and lawful even though the system has a discriminatory effect. Requiring the defendants to bear this burden of persuasion is consistent with the intent of Congress', which determined that "a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." County of Washington v. Gunther, 49 USLW 4623 (1981).

The overtly racist practices of the Company and Unions, their actions which, at critical times in the development of the seniority system, promoted segregation, the serious adverse consequences of the system upon the employment opportunities of blacks, and the general lack of justification or rationality for their acts mani-

festly lead to the conclusion that the seniority system was not bona fide, and differences in treatment thereunder were the result of intentional discrimination.

The Company and Unions responsible for the seniority system each engaged in blatantly discriminatory practices during the period when the seniority system was developed. "[T]here is a high probability that where [an institution has] effectuated an intentionally segregative policy in a meaningful portion of [its system], similar impermissible considerations have motivated their actions in other areas of the system." Keyes v. School District No 1, 413 U.S. 189, 208 (1973). Moreover, during the period when the plant was unionized in 1941 and during the period when in the Steelworkers' unit the importance of seniority and departmental struc-

ture greatly increased, the Unions and the Company took a series of actions which increased the number of one-race departments in the plant. Where a sequence of events leads inevitably to increased segregation and where the actors involved constantly refer to race in making decisions, then the racial purpose of the actors is manifest. This conclusion is buttressed by the fact that the manner of the division of the plant into bargaining units in 1941 was irrational and contrary to NLRB principles.

In examining whether a specific act was undertaken with an invidious motive, it is essential to determine whether the act "bears more heavily on one race than another," Washington v. Davis, 426 U.S 229, 242 (1976). A showing of substantial racial "imbalance is often a telltale sign

of purposeful discrimination," Teamsters v. United States, 431 U.S at 339 n. 20. On the effective date of Title VII 96% of the employees in the Bessemer plant were located in racially identifiable departments -- black workers were concentrated in those departments and jobs with the lowest earnings while white workers were concentrated in those departments with the highest earnings.

II.

If a district court "premise[s] its ... finding[s] ... on an erroneous interpretation of the standard to be applied ...," the clearly erroneous rule does not apply and the findings may not stand. United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). The findings of a trial court based on a "paper case" do not carry the same weight on appellate

review as those based on oral evidence. The Fifth Circuit properly exercised appellate review by reversing the legal error of the district court and by concluding that a review of the documentary and other evidence "leaves us with the definite and firm conviction that a mistake has been made."

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE SENIORITY SYSTEM WAS INTENTIONALLY DISCRIMINATORY AND THEREFORE NOT PROTECTED BY SECTION 703(h) OF TITLE VII.

A. Section 703(h) Must Be Interpreted and Applied in a Manner Consistent with the History and Purposes Underlying Title VII.

For more than a hundred years after the Emancipation Proclamation, the American workplace was marked by deliberate practices designed to restrict black workers to

specific inferior positions and to exclude them altogether from desirable, skilled, high paying jobs.[64/] Judicial findings of exclusion of blacks from the skilled crafts, for instance, "are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers of America v. Weber, 443 U.S. 193, 198 n. 1 (1979), and cases cited therein. Similar

---

64/ For a full discussion of the history of blacks in the American workplace, see S. Spero and A. Harris, The Black Worker (Atheneum ed. 1974). See also, G. Myrdal, An American Dilemma at 1079-1124 (Harper & Row ed. 1962). A thorough discussion of black workers during the period from World War I through World War II is found in R. Weaver, Negro Labor, A National Problem (1946), and of blacks in labor unions in R. Marshall, The Negro and Organized Labor (1965); R. Marshall and V. Briggs, The Negro and Apprenticeship (1967); and H. Northrup, Organized Labor and the Negro (1944). For more recent discussions, see H. Hill, Black Labor and the American Legal System: Race, Work and the Law (1977), and W. Gould, Black Workers in White Unions (1977).

judicial findings of racial discrimination and exclusion have repeatedly been made with regard to some forms of public employment as well. See Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 690 (6th Cir. 1979), cert. denied, 101 S. Ct. 783 (1981), and cases cited therein (law enforcement agencies).

Where black workers were not shut out altogether by employers or unions, they were set aside often in segregated locals and separate departments, with little or no opportunity for advancement. In many industries, particularly in the South, seniority systems were designed and manipulated to protect the favored position of white employees and to keep blacks in dead-end jobs and segregated departments. For example, in the decades following the Civil War many companies, including some

which had previously owned slaves, hired blacks to work on the railroads at lower wages than those paid whites. The all-white unions, rather than admitting blacks to their membership and demanding equal wages for all employees in the same job category, demanded instead that black railroad workers be prevented from using their accrued seniority rights to obtain better runs and to advance to higher job classifications. See S. Spero and A. Harris, The Black Worker at 286-315 (Atheneum ed. 1974); H. Hill, Black Labor and the American Legal System: Race, Work, and the Law at 334-72 (1977). Although the overt racial bars have since been removed, the resulting seniority systems are still in effect today. See, e.g., Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365, 1371-74 (10th Cir. 1981). Similar practices of

racial gerrymandering, manipulation of seniority lines, and perversion of seniority systems for racial reasons were common in other southern industries as well.[65/] See H. Northrup, The Negro in the Paper Industry at 74-79 (1969); H. Northrup, The Negro in the Rubber Tire Industry at 32-33, 49-50 (1969); H. Northrup, The Negro in the Tobacco Industry at 26-30, 33-39, 40-41, 87 (1970); C. King and H. Risher, The Negro in the Petroleum Industry at 28-29, 36-38 (1969); L. Rubin, The Negro in the Shipbuilding Industry at 115-16, 127 (1970). Cf. James v. Stockham Valves and Fittings

---

65/ "As black workers in the steel industry, in pulp and paper manufacturing, in oil and chemical refineries, in tobacco factories and in other industries have learned, what exclusion is to the craft unions, separate lines of promotion and seniority are to the industrial unions." H. Hill, Black Labor and the American Legal System, supra at 25.

Co., 559 F.2d 310, 347-53 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978) (manufacturing); United States v. Georgia Power Co., 634 F.2d 929, 934-37 (5th Cir. 1981), cert. pending, sub nom, Electrical Workers Local No. 84 v. United States, 50 USLW 3080 (August 25, 1981) (production and transmission of electrical power); Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981) (manufacturing). Thus, as this Court recognized in Teamsters, there are "seniority systems [which are] themselves 'racially discriminatory' or had their 'genesis in racial discrimination' ...." 431 U.S. at 346 n. 28, quoting Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968).

The Civil Rights Act of 1964 was the first comprehensive federal legislation ever to address the pervasive problem of

discrimination against blacks in modern American society. See M. Sovern, Legal Restraints on Racial Discrimination in Employment 8 (1966). Extensive hearings had focused the attention of Congress on the adverse social and economic consequences of discrimination against blacks in employment and other fields,[66/] and when the House Judiciary Committee issued its report on the bill which became the Civil Rights Act of 1964, it clearly stated that a primary objective of the Act was to

---

66/ See, e.g., Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2300-03 (1963); Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

eliminate the effects of discrimination against black citizens:

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.
>
> * * *
>
> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities....
>
> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination....

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 2018.

In United Steelworkers of America v.

Weber, 443 U.S. 193 (1979), this Court reviewed the legislative history and concluded that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'" Id. at 202, quoting 110 Cong. Rec. 6548 (remarks of Sen. Humphrey). Congress recognized that blacks were largely relegated to unskilled and semi-skilled jobs, and that since the 1940s the relative position of the black worker had steadily worsened. Id. Congress further recognized that, unless this trend were reversed, the goal of the Civil Rights Act -- "the integration of blacks into the mainstream of American society" -- could not be achieved. Id. at 202-03. Therefore,

> it was clear to Congress that "the crux of the problem [was] to open employment opportunities for Negroes

> in occupations which have been traditionally closed to them," [110 Cong. Rec.] at 6548 (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.
>
> * * *
>
> [The enactment of Title VII was] triggered by a Nation's concern over centuries of racial injustice and [was] intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec., at 6552 (remarks of Sen. Humphrey)....

Id. at 203-04.

Title VII was designed to provide powerful and effective remedies for these critical social problems. As this Court has consistently held, "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." Franks v. Bowman

Transportation Co., 424 U.S. 747, 763 (1976), and cases cited therein; County of Washington v. Gunther, 49 USLW 4623, 4628 (1981). The sweeping terms of the statutory prohibition of discrimination reflect the congressional purpose: it is unlawful "to fail ... to hire or to discharge ... or otherwise to discriminate ... with respect to ... compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify ... in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status." 42 U.S.C. § 2000e-2(a) (emphasis added). "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." County of

Washington v. Gunther, 49 USLW at 4628, quoting S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964).

In § 703(h), Congress provided a limited exemption from this broad prohibition of discriminatory practices. As the Court stated in Teamsters, this provision "does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race....'" 431 U.S at 353. In California Brewers Association v. Bryant, 444 U.S 598 (1980), the Court reiterated its view that § 703(h) must not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures, or tests' that disproportionately affect members of those groups

that the Act protects." Id. at 608. The Court's interpretation of § 703(h) thus accords with the longstanding principle of statutory construction that a remedial statute should "be given a liberal interpretation ... [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended." Piedmont & Northern R. Co. v. ICC, 286 U.S. 299, 311-12 (1932). See also, Group Life and Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976); Peyton v. Rowe, 391 U.S. 54, 65 (1968). Like the general prohibitions of discrimination contained in §§ 703(a) and (d), the exception provided by § 703(h) "must ... be read against the background of the legislative history of Title VII and the historical context

from which the Act arose," United Steelworkers v. Weber, 443 U.S. at 201, and it must be interpreted in a manner which does not "'bring about an end completely at variance with the purpose of the statute'" .... Id. at 202, quoting United States v. Public Utilities Commission, 345 U.S. 295, 315 (1953). In view of the broad approach adopted by Congress, the Court "must ... avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." County of Washington v. Gunther, 49 USLW at 4628.

The importance of seniority rights in the modern workplace underscores the proper construction of § 703(h) as a narrow exception which does not defeat the fundamental purpose of Title VII. As the Court stated in Franks v. Bowman Trans-

portation Co., supra:

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation.... Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority).... We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job. ... More than any other provision of the collective [-bargaining] agreement ... seniority affects the economic security of the individual employee covered by its terms....

424 U.S. at 766 (citations omitted). See also, Cooper and Sobol, Seniority and Testing Under Fair Employment Laws; A General Approach To Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1601-07 (1969).

This Court recognized in Franks that, because seniority rights are so important,

the victims of illegal racial discrimination are presumptively entitled to awards of retroactive seniority which will, insofar as possible, restore them to the positions they would have held in the absence of discrimination. Seniority relief therefore may be denied "'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" 424 U.S. at 771, quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). For the same reasons, § 703(h) is properly interpreted in a manner which both recognizes the intent of Congress to protect seniority systems which meet the statutory criteria from alteration, and does not undermine the fundamental

purposes of Title VII. Section 703(h) was not intended to be an instrument for depriving black workers of the seniority rights which are essential if they are to achieve their rightful place in the mainstream of American society.

B. The Seniority System Was Not Bona Fide, and Differences in Treatment Thereunder Were the Result of Intentional Discrimination

In Teamsters, this Court construed § 703(h) of Title VII, which reads in pertinent part,

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system, ... provided that such differences are not the result of an intention to discriminate because of race ....

This section, it was held, meant that a seniority system is not unlawful under Title VII merely because it perpetuates

past discrimination, 431 U.S. at 353.[67/] The Court noted that § 703(h) provides a "measure of immunity" for such systems. This Court cautioned, however, that:

> To be sure § 703(h) does not immunize all seniority systems. It refers only to "bona fide" systems, and a proviso requires that any difference in treatment not be "the result of an intention to discriminate...."

Id. The system challenged by the Government in Teamsters was found to be bona fide, in part, because the system applied equally to all employees, did not have its genesis in racial discrimination, had not been negotiated or maintained with a discriminatory purpose, and the structure of its bargaining units was rational. 431 U.S. at 355-56. It is clear that, after

---

67/ Such systems, the court noted, "[w]ere it not for §703(h), ... would seem to fall under the Griggs rationale." Id. at 349.

the decision in Teamsters, a court must examine the "totality" of the circumstances surrounding the adoption or maintenance of a seniority system, and determine whether the system was designed with an intent to discriminate.[68/] The Fifth Circuit prop-

---

68/ There is no requirement that a plaintiff show that the challenged action "rested solely on racially discriminatory purposes." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265 (1977). See also Personnel Administrator of Massachusetts v. Feeney, 442 U.S 256, 276 (1979)("The dispositive question ... is ... whether ... a ... discriminatory purpose has, at least in some measure, shaped [the challenged decision].") That such a showing would not be required is even more true of a Title VII case than in a case premised upon a constitutional violation in view of the rejection of the McClellan Amendment which would have added the word "solely" to the language of the Act. See 110 Cong. Rec. 13837-38. Senator Case made the following observation during the debate on this amendment:

> The difficulty with this amendment is that it would render Title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.

properly applied the law, by looking to the totality of the circumstances and examining in particular the features of the system that this Court found significant in Teamsters. App. 9.

This Court has counseled that, since evidence of discriminatory intent is seldom apparent or direct, the "proof of discriminatory intent must necessarily usually rely on objective factors...." Personnel Administrator of Mass. v. Feeney, 422 U.S 256, 279 n. 24 (1979). See, Washington

---

68/ Continued

> But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.

Id. at 13837. Cf. United States v. Bd. of Commr's of Indianapolis, 573 F.2d 400, 411 n. 27 (7th Cir.), cert. denied, 439 U.S. 824 (1978), where the court noted, "an illicit motive may be only subordinate and still affect the outcome of a decision."

v. Davis, 426 U.S. 229, 242 (1976)("... an invidious discriminatory purpose may often be inferred from the totality of the relevant facts ...."). See Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir.), cert. denied, 409 U.S. 982 (1972); United States v. Bd. of School Commr's of Indianapolis, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S 824 (1978). In Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977), the Court summarized some evidentiary sources appropriately considered:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action -- whether it "bears more heavily on one race than another," Washington v. Davis, [426 U.S. 229], 242 [(1976)] -- may provide an important starting point. Sometimes a clear pattern, unexplainable on

> grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face....
>
> The historical background of the decision is nmaker's purposes.... Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

Id. at 266-67 (citations and footnotes omitted).

1. Burden of Proof. Like the other provisions of § 703(h), the provision immunizing "bona fide seniority systems" creates an affirmative defense by which an employer or union may demonstrate that its practices are lawful even though they have a discriminatory effect. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405,

425 (1975); County of Washington v. Gunther, 49 USLW 4623, 4625-26 (1981). Cf. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974). Thus, where the plaintiffs establish that a seniority system has a discriminatory impact, the burden shifts to the employer or union to demonstrate that the system is bona fide and that differences in treatment thereunder are not the result of intentional discrimination.[69/]

69/ This placement of the burden of persuasion is entirely appropriate. The burden properly rests upon the party claiming "the benefits of an exception to the prohibition of a statute." United States v. First City National Bank, 386 U.S. 361, 366 (1967). Moreover, having created, operated, and maintained the seniority system, the defendants have superior access to the relevant evidence, and they have a far better opportunity than the plaintiffs to develop the pertinent facts. Cf. Teamsters, 431 U.S. at 359 n.45 "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the

The district court so held in the present case. App. 25.[70/]

2. Racial practices of the Defendants. In assessing whether an institution has acted with a discriminatory purpose the "historical background... is

---

69/ Continued

proof" (citations omitted). Finally, requiring the defendants to bear the burden of persuasion with respect to this affirmative defense is fully consistent with Congress' "'broad approach' to the definition of equal employment opportunity ...." County of Washington v. Gunther, 49 USLW at 4628 quoting S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964). "The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach." Id.

70/ The Fifth Circuit did not address the question. Since the record contains ample proof that the seniority system was not bona fide and that its adverse effects on black employees were the result of intentional discrimination, the system in this case would be unlawful even if the burden of persuasion were on the plaintiffs.

one evidentiary source, particularly if it reveals a series of ... actions taken for invidious purposes." Arlington Heights, 429 U.S. at 267. Here the Company and the Unions were engaged in overtly racist behavior at the very time that the seniority system was developed.[71/] "[T]here is high probability that where [an institution has] effectuated an intentionally segregative policy in a meaningful portion of [its system], similar impermissible considerations have motivated their actions in other areas of the system." Keyes v. School District No. 1, 413 U.S. 189, 208 (1973); Columbus Board of Education v. Penick, 443 U.S. 449, 458 n. 7 (1979).

71/ Respondents use the term "racist" advisedly to describe practices based clearly and openly on race. See, e.g., pp. 13-17, 21-23, supra.

Each of the three institutions, Pullman-Standard, Machinists and Steelworkers, responsible for the development of the seniority system engaged in blatantly racist practices. Virtually every conceivable employment decision made by Pullman-Standard was influenced by race. For example, the race of an employee dictated the job he was assigned, the facility he could use, the badge number he had, and the hourly wage he received. See Section C.1. a, supra. Also "racial segregation was extensively practiced ... in the local union hall [of the Steelworkers]" App. 39. Black members of the Steelworkers Local at the Bessemer plant had their "place." Until 1974 union members were segregated at meetings and the restrooms remained segregated until the integration of restrooms at the Company

in 1967. Until well after the passage of Title VII blacks always served in two specific positions out of the five elected officer positions in the Local, see p. 16, supra. Most importantly, in the 1950s and 1960s, white union officials refused to process racial grievances.[72/] While blacks had their "place" within the Steelworkers,

---

72/ The district court stated tht "[i]t is not without significance that blacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeeman, and negotiators. While not foreclosing the possibility of discriminatory conduct ... these facts are certainly relevant to the issues before the court." App. 34 n.14. However, black participation must be placed within the context of the segregation at the plant and the union hall, the refusal of white officials to press racial grievances, and the acquiescence by black officials because "it wasn't time for it," see n.22, supra. See also Castaneda v. Partida, 430 U.S. 482, 499 (1977) ("... it would be unwise to presume as a matter of law that human

they had no place within the Machinists. Until 1948 the Machinists limited their membership to "qualified white candidates," see section C.1.c, supra.

3. Development and Maintenance of the Seniority System

If a seniority system's "genesis" was affected by a discriminatory purpose then the system would not receive the protection

---

72/ Continued

beings of one definable group will not discriminate against other members of their group.") See also opinion of Marshall, J., concurring: "Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group," (footnotes omitted). Id. at 503.

of §703(h) because the "differences" in conditions of employment would be "the result of an intention to discriminate because of race...." As the Court stated in Teamsters, "a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption." 431 U.S. at 346 n.28.

Where, as here, the seniority system developed in a historical context of "actions taken for invidious purposes," there is a strong inference that these practices affected the system. Arlington Heights Metropolitan Housing Corp., 429 U.S. at 266; cf., Strauder v. West Virginia, 100 U.S. 203, 205 (1880).[73/]

73/ The Steelworkers suggest in their brief that evidence of historical discrimi-

This record demonstrates that "an intent to discriminate entered into

---

73/ Continued

nation prior to and during the creation of the seniority system is not relevant to the bona fides question. Brief 40-41 n. 43. This position is contrary to the view this Court has taken in a number of cases stressing the relevance and importance of placing the questioned acts within their historical context. Arlington Heights, supra; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 456 (1979); Dayton v. Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979); City of Mobile v. Bolden, 446 U.S. 55, 59 (1980). Several courts of appeals have also viewed such evidence as relevant. See, e.g., Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1237, (5th Cir. 1980); Barnes v. Jones County School District, 554 F.2d 804 (5th Cir. 1977); Resident Advisory Bd v. Rizzo, 564 F.2d 126, 144 (3d Cir. 1977). The petitioners simply seek to evade the fair inference to be drawn: in an era when racial considerations permeated almost every employment decision, it requires only "common sense" to reject any notion that the seniority system escaped the taint of racial discrimination. Keyes, 413 U.S. at 201. There is a logical inference of discrimination, as the district court found, from the evidence that [b]oth in 1941 and in 1954, racial segregation was extensively practiced at the ... plant [and] in the local union hall. ..." App. 39.

[the seniority system's] very adoption." 431 U.S. at 346 n.28. The district court failed to consider adequately the "causative relationship" between the invidious discriminatory practices of the Company and the Unions and the development of the seniority system. Instead it improperly limited analysis of genesis "to the extent of racially discriminatory practices at the time the seniority system came into existence." App. 38. The court refused to consider the racial motivation of one of the parties responsible for the adoption of the seniority system, the Machinists,[74/]

74/ The district court did not consider the motivation of the Machinists because of its view that neither the Steelworkers nor the Company can be "fix[ed] with responsibility... for whatever racial discrimination may have existed in the IAM...." App. 42. This was error. First, the seniority system throughout the plant, including the division between bargaining units, was

and the nature of the division of the plant into bargaining units.[75] Furthermore, the court's failure to apply the proper standard for determining and evaluating evidence relevant to genesis resulted in the court wrongly concluding that although

---

74/ Continued

before the Court. See pp. 4-5, supra. Second, whether a seniority system is lawful depends upon whether an invidious purpose affected its adoption; if one of the parties creating the system acted with deliberate discriminatory purpose then the system is unlawful. Third, the relative responsibility of the Machinists, Steelworkers and Pullman-Standard is not relevant to the stage 1 or liability phase which was tried below, but may be relevant to the stage 2 or remedy phase of this which remains to be tried. JA 30 (The issue of monetary relief was "severed for trial, if necessary, at a subsequent date"). Cf. Teamsters, 431 U.S at 360.

75/ The district court erroneously concluded that the NLRB certification of the bargaining units, in effect, insulated this division of the jobs from charges that the parties were racially motivated. See, section 5, infra.

"two times of 'origin' might be examined... 1941-42, when union organizational efforts were finally successful... or 1954, when the seniority system under attack in this litigation became essentially fixed...[,] [s]election of the more appropriate date is not... critical under the circumstances of this case, for the evidence reflects similar practices at both periods." App. 38-39. In fact, the analysis of the genesis of the system must cover the entire period from 1941 through 1954 because the events in 1941-42 and the early 1950s should be clearly distinguished.

The seniority system had its origin in 1941 when several unions sought to represent employees at the Bessemer plant. The major focus -- and for this case the relevant issue -- in the 1941 NLRB hearing was the proposed bargaining units sought by the

Machinists and the Steelworkers[76/], see section B. 2. b, supra. Consistent with its policy of excluding blacks from membership, the Machinists sought an all-white bargaining unit. While the Machinists sought only those jobs staffed by white workers, in its November 1941 certification the NLRB designated jobs which were staffed by blacks and which were functionally related to those claimed by the Machinists. Id. The Machinists, with the agreement of the Company and Steelworkers, transferred to the Steelworkers' unit the jobs containing all 24 of the black employees who had been placed by the NLRB within the Machinists' unit. As a result of this

---

76/ In 1941 the Steelworkers were known as the Steel Workers Organizing Committee or "SWOC". Subsequently, the name was changed to the United Steelworkers of America. App. 35, n. 15.

gerrymandering, the Machinists obtained an all-white unit, and created five one-race departments which had not existed prior to unionization. See section B.2.b, supra.

As the Fifth Circuit concluded, "the IAM manifested an intent to selectively exclude blacks from its bargaining unit, NLRB certification considerations notwithstanding. That goal was ultimately reached when maneuvers by the IAM and USW resulted in an all-white IAM unit." App. 14-16. The Machinists' unit remained all-white until 1970. App. 7. The division of the plant into bargaining units meant that the jobs in the IAM unit would remain all-white since, as a practical matter, a worker spent his entire career, unless he progressed to management, on the jobs in one bargaining unit, see section B.3.a, supra.

The racially motivated creation of the Machinists' bargaining unit, which resulted in the deliberate carving out of an all-white unit, creates a presumption that other parts of the seniority system which disadvantage blacks are not "adventitious." Keyes v. School District No. 1, 413 U.S. at 208; Columbus Bd. of Education v Penick, 443 U.S. at 458 n 7. Moreover, the accommodation by the Company and the Steelworkers[77] to the racist plans of the Machinists is directly relevant to assessing their intent during the development of

---

77/ We note that the Steelworkers had a legitimate interest in expanding their bargaining unit, whereas the Company had no legitimate interest in agreeing to the balkanization of its departments according to racial lines. Nevertheless, the Steelworkers, who were aware of the Machinists' policy of excluding blacks, see pp. 21-22, supra, acquiesced in the IAM's policy by agreeing to the deliberately discriminatory transfer of jobs in December 1941.

the seniority system. See City of Memphis v. Greene, 49 USLW 4389, 4393 nn. 24, 26 (1981).[78/]

78/ Under some circumstances, the lower courts have found evidence of accommodation to the racist goals of others to be sufficient proof in itself of invidious motivation. See, e.g., Arthur v. Nyquist, 573 F.2d 134, 144 (2d Cir. 1978) (finding intentional discrimination because the school board was "strongly influenced by residents who opposed integrated schooling"); Resident Advisory Board v. Rizzo, 564 F.2d 126, 144 (3d Cir. 1977) ("shift in the City's position [following] protests by demonstrators manifesting racial bias" evidences a constitutional violation). Accord Davis v. Schnell, 81 F. Supp. 872, 875, 880-82 (S.D. Ala.), aff'd, 336 U.S. 933 (1949), cited with approval in Arlington Heights, 429 U.S at 267; United States v. Board of School Commissioners, 573 F.2d 400, 412 n. 31 (7th Cir. 1978); United States v. School District 151, 301 F. Supp. 201, 2130 (N.D. Ill. 1969), aff'd, 432 F.2d 1147 (7th Cir. 1970); Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807, 822-23 (W.D. Pa. 1973), appeal dism'd, 495 F.2d 1095 (3d Cir.), cert. denied, 419 U.S. 884 (1974) ("A school board may not, consistently with the Fourteenth Amendment ... permit educational choices to be influenced by a policy of racial segregation in order to accommodate community sentiments").

After the unionization of the plant, another critical period in the development of the seniority system occurred in the mid-1950s. At that time the importance of seniority increased substantially within the Steelworkers' unit for several reasons: (1) the scope of the seniority was broadened from "occupational" to "departmental," (2) the discretion of the Company to transfer employees without any loss of seniority to the employee was substantially reduced, and (3) the use of seniority was extended to the determination of promotions, see p. 39, supra. Just before the important switch in 1954 to departmental seniority, the Steelworkers and the Company created seven new one-race departments within the Steelworkers' bargaining unit: Air Brake Pipe Shop, Boilerhouse, Die and Tool, Janitors, Plant Protection, Power-

house, and Steel Miscellaneous, see section B,3.b, supra.[79/] All of the departments were carved out of departments which contained both white and black employees.[80/] Id.

79/ The history of the Air Brake Pipe Shop is illustrative of the manipulation of departments at the plant. Before unionization the Air Brake Pipe Shop was included within the racially mixed Steel Erection department. The jobs in this department were functionally related, see n.32, supra. As a result of the certification of the IAM, the Air Brake Pipe Shop became an all-white department within the IAM unit, see p. 32, supra. In 1944 when the IAM ceded several departments to the Steelworkers the Air Brake Pipe shop was returned to the Steelworkers unit and in 1947 with the application of "occupational" seniority the Air Brake Pipe Shop was reabsorbed in the Steel Erection department, see n.46, supra. Then in 1954 just before the return to departmental seniority, the Air Brake shop was once again split from the Steel Erection department in order to form an all-white department. See p. 42, supra.

80/ The district court's brief discussion of the possible "rationality" of the creation of some of these departments (App. 32) ignores the inference raised by the circumstances surrounding the creation of the one-race departments with attendant segregative effect. See pp. 121-22, infra.

The seniority system which was "fixed" by the mid-1950s had essentially developed, as the district court indicated, during two periods, the unionization process in 1941 and the major changes in the application of seniority within the Steelworkers' unit in the 1950s. During both these periods the number of one-race departments was substantially increased. The consequences of the creation of the all-white IAM bargaining unit in 1941 and the creation of one-race departments within the Steelworkers' unit were continued by the seniority forfeiture provisions governing transfer between departments or bargaining units. These forfeiture provisions amounted to a no-transfer rule, see section B.4, supra.[81/]

81/ The "lock-in" consequences for white workers within the Steelworkers' unit were

In 1968 the Company negotiated with the Department of Labor a "conditional memorandum of understanding to enhance opportunities of blacks." The implementation of the memorandum was frustrated by the refusal of the Unions to agree to its terms. Similarly, in 1972 the Unions refused to sign another agreement which was "to serve as a corrective action program" and which had been negotiated between the Labor Department and Pullman-Standard. Id.

81/ Continued

much less severe than those for black employees not only because they were located in the higher-paying departments, but also because the higher-paying jobs within racially mixed departments were often reserved for whites. For example, as of 1964, the median job class for all 95 employees within the Forge department was 6, while the median job class for the 53 blacks in the department was 2. Appendix B, Table 3.

Where a "sequence of events" leads inevitably to increased segregation and where the actors involved constantly refer to race in making decisions, then the racial purpose of the actors is manifest. Dayton Bd. of Education v. Brinkman, 443 U.S. at 538; Columbus Bd. of Education v. Penick, 443 U.S at 564, n. 13; see Arlington Heights, 429 U.S. at 267. The institutions -- the IAM, the Steelworkers, and the Company -- grafted the seniority system onto a plant structure which contained numerous racially identifiable departments and then took a series of actions in 1941 and from 1952 through 1954 which resulted in additional segregation. Moreover, the gerrymandering of departments at these times was not fortuitous but rather corresponded to significant developments in the seniority system which sub-

stantially affected the seniority and job rights of employees. This manipulation by the Company and Unions at critical periods in the development of the seniority system reflects and emphasizes the invidious purpose which affected the system.[82/]

4. Application of the Seniority System and its Effect. In Teamsters, the Court found the seniority system bona fide because, in part, the seniority system "[t]o the extent that it 'locks' employees into non-line-driver jobs, it does so for all. The city drivers .. who are discouraged from transferring ... are not all Negroes ...; to the contrary, the over-

---

82/ In Arlington Heights, this Court noted that if a restrictive zoning action had been taken immediately after a board learned of impending construction of integrated housing, a "far different case" would have been presented. 429 U.S at 267. See also Resident Advisory Bd. of Rizzo, 564 F.2d at 144.

whelming majority are white," 431 U.S at 355-56.[83/] Because the Teamsters case involved only two "departments" (city and line drivers), the "locking-in" effect of the seniority system's restriction on transfers between the two "departments" did not disproportionately affect black workers, who were a minority of employees in the less desirable "department." Here, in contrast, the seniority system "locked-in" in the overwhelming majority of black workers into all black, or predominantly black, lower paying departments. There are two separate questions regarding the application or "neutrality": was the system applied equally and what were the racial

---

83/ In fact, of the 1284 individuals who were "locked "into the city-driver positions, 1,117 or 87% were white. 431 U.S. at 342, n. 23.

consequences, or degree of adverse impact, of the system.

There is no question that before 1965 the system was applied in a racially unequal manner. Even within a department in the Steelworkers' unit, there were jobs reserved for "whites" and "colored," see p. 14 supra; App. 39. Black workers could not use their seniority to promote to the higher-paying "white" jobs, and the officials of the Steelworkers refused to process grievances based upon racial discrimination, see n.22, supra. The operation of a "dual" seniority system illustrates the racial bias of the Company and unions during the development and maintenance of the system.

In evaluating whether the adoption or continuation of the seniority system was affected by a discriminatory purpose,

the district court refused to look at the adverse impact of the system.[84/] App. 28-29. Even though the court noted that

---

84/ The district court stated that it would be a "misreading" of Teamsters to examine the degree of adverse impact, at least where the "rule affects significant numbers of both white and black employees." App. 29. The court indicated, though, that if "a seniority rule were shown to penalize all blacks and no whites, the inference that the rule was racially motivated would seem compelled," id., but -- not finding the "inexorable zero," -- the court rejected the relevance of the statistical evidence. This limited view of statistical evidence in cases of racial discrimination should have been ended by this Court's decisions in Castaneda v. Partida, 430 U.S. 482, 497, n. 17 (1977) and Hazelwood School District v. United States, 433 U.S. 299, 311, n. 17 (1977). Moreover, nothing in Teamsters prevents a district court from examining the racial impact of a seniority system. Rather the Teamsters analysis fully supports such an examination. In Teamsters the Court determined that the "overwhelming majority" of those disadvantaged were white -- a circumstance very different from this case, see section B, 5, supra -- and the court also stressed the importance of statistics in determining discriminatory purpose. 431 U.S. at 356, 339-40.

the "effect of the no-transfer rule ... may well be .. .somewhat greater ... [on] blacks than whites ....," the district court concluded that "a study of relative economic desirability [of the departments] would be inappropriate."[85/] App. 30. As

---

85/ In its first decision in this case, the Fifth Circuit reversed the district court's conclusion that a showing of classwide economic harm is necessary to establish a prima facie case of discriminatory departmental assignments. App. 83-84. The district court's ruling that a practice which continued the effects of discriminatory departmental assignment was not unlawful unless there was attendant economic harm was held by the Fifth Circuit to be "inconsonant with the Act and its interpretive cases." Id. This Court agreed in Teamsters: "Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another," 431 U.S at 338, n.18 (emphasis in original).

In its subsequent opinion on the bona fides of the seniority system, the district court incorrectly reasoned that if proof of economic impact is not a necessary element

the Fifth Circuit ruled, the district court erred in refusing to evaluate the adverse impact of the system. The substantial adverse impact of the seniority system and the fact that in general blacks "were relegated to the least remunerative departments" provide critical evidence of the invidious purpose of the Company and Unions. App. 10-12.

For the racial impact of an act is an "important starting point" in determining

---

85/ Continued

in a prima facie case, then evidence of economic impact is not probative on the questiona of the motives of those who established the seniority system. App. 29-30. The "holding that the appellants need not show that they were assinged discriminatorily to less desirable departments in order to prove a prima facie case of racial discrimination cannot reasonably be construed to preclude consideration of the fact that by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites." App. 10.

the existence of discriminatory purpose. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 279 n. 25. In determining whether a specific act was undertaken with an invidious motive, it is essential to determine whether the act "bears more heavily on one race than another," Washington v. Davis, 426 U.S 229, 242 (1976), cited in Arlington Heights, 429 U.S. at 266. Again in Teamsters, the Court stated that "[s]tatistics showing racial or ethnic imbalance are ... often a telltale sign of purposeful discrimination," 431 U.S. at 340 n.20, and that in some cases the use of statistics alone has been sufficient "to establish a prima facie case of [purposeful] racial discrimination," 431 U.S. at 339. Furthermore, proof that "actions hav[e] foreseeable and anticipated disparate impact [is] relevant

evidence to prove the ultimate fact, forbidden purpose." Columbus Bd. of Education v. Penick, 443 U.S. at 464; Dayton Bd. of Education v. Brinkman, 443 U.S at 536, n. 9; Keyes v. School District No. 1, 413 U.S. at 198; Washington v. Davis, 426 U.S at 253. (Stevens, J., concurring).

In fact, the overwhelming majority of employees at the plant were located in racially identifiable departments -- those departments where there was a "serious disproportionality" in the racial composition of employees.[86/] In 1964, just be-

---

86/ This Court has indicated that if there is a "serious disproportionality" in the racial composition of employees as determined by a proper statistical analysis, then there may be either an inference of or the establishment of a prima facie case of purposeful discrimination. Hazelwood School District v. United States, 433 U.S at 311, n. 17; see Castaneda v. Partida, 430 U.S: at 497, n. 17. The Hazelwood -

fore the effective date of Title VII, 96% or 3727 of the 3875 employees were working in racially identifiable departments. See nn.58-60, supra. The racial identity of the departments was firmly established by 1956 when the seniority system had reached the form in which it operated until the plant closed, see section , B. 5, supra; in 1956 1355 or 86% of the 1579 employees were employed in racially identifiable departments. Appendix B, Table 2.[87/]

86/ Continued

Castaneda analysis has been applied to determine whether there is a "serious disproportionality" in the racial composition of a department. See Appendix B for a detailed description of the methodology.

87/ There were 28 departments in 1964 and 29 departments in 1956, Appendix B, Tables 1 and 2. According to the Castaneda - Hazelwood analysis, 19 departments in 1964 and 18 departments in 1956 were racially identifiable. Id. In addition to those departments, there were three departments in 1964 Boilerhouse, Powerhouse, and

The racial staffing of the departments combined with the "lock-in" effect of the seniority forfeiture or "no-transfer" rule, see section B. 4, supra, had a severe adverse economic impact on blacks. For example, in 1964 eight of the 28 departments had a median job class[88/] of 10 or above; of the 2545 white employees, 1959 or 76.9% were in these "high ceiling" departments as compared to only 230 or 17.3% of the 1325 black employees. See Appendix B,

---

87/ Continued

Template, and four departments in 1956 (Boilerhouse, Die and Tool (CIO), Powerhouse, and Template) which had historically included employees of only one race, but which could not be subjected to the statistical determination of "identifiability" because of their size. Nonetheless, their racial composition fits the overall pattern of racial stratification at the plant.

88/ The average hourly rate for a job is determined by the job class assigned to the job, see n.61, supra.

Table 3, section B.5, supra. On the other end of the scale, departments which had a median job class below 5, the racial composition was reversed -- 443 or 21.9% of all blacks were located in these "low-ceiling" departments as compared to only 177 or 5.7% of white employees. Id.[89/]

Finally, the continuing economic burden imposed by the seniority system on

---

89/ Unlike the situation in Teamsters, in this case black workers were not only largely excluded from the better-paying departments they were also the "overwhelming majority" in the lower-paying departments. In Teamsters, whites constituted 87% of the employees in the lower-paying city driver position, whereas here whites constituted only 29% of the employees in the lower paying departments even though they constituted two-thirds of the workforce. Moreover, unlike Teamsters where blacks and whites performed the same job in the lower paying department, at the Bessemer plant white workers were employed in the higher paying jobs in racially mixed departments. Thus, the effect of being limited to the lower-paying departments was not as severe for whites as it was for blacks.

black workers is illustrated by the base average hourly wages which in 1973 were paid to workers in the Steelworkers' unit with more than six years of seniority: 551 of 74.1% of all black employees compared to 119 or 15.8% of all white employees earned less than $4.25 an hour, job class 8 or below; 634 or 80.7% of all white employees as compared to 192 or 19.9% of all black employees earned more than $4.40 an hour, job class 10 or above. JA 65. The base average hourly wage for black workers in the Steelworkers' unit was $4.14 as compared to $4.45 for white employees. Id.

Black employees of Pullman-Standard clearly suffered substantial economic losses because of their historical exclusion from the IAM bargaining unit. The two IAM departments, Maintenance (IAM) and Die and tool (IAM) were two of the higher

paying departments at the company. Appendix B, Table 3. On the June 1, 1972 seniority list, the 139 employees in those departments included 128 whites and 11 blacks, with every black in the unit having a seniority date no earlier than 1971. Plaintiffs' exhibit 9 (1974 Trial). The average hourly base rate of employees in the IAM unit was $4.57, whereas blacks in the Steelworkers' unit averaged $4.14. See nn.62-63, and accompanying text. Section 3.b.5. Thus, there was at least a $.43 average hourly wage disparity between workers within the Machinists' unit and blacks in the Steelworkers' unit. 90/

90/ The Company attempts to explain the substantial differences between the wages of black workers and white workers by referring to a chart prepared by the district court for its 1974 decision and to an exhibit introduced by the Company which purported to compare gross earnings of

5. Rationality of the Seniority System. In Teamsters, the Court ruled that the system was bona fide because, in part, it was "rational, in accord with the industry practice, and consistent with National Labor Relations Board precedents,"

90/ Continued

black and white workers. Brief 10-11. The company's explanation fails for several reasons.

First, the Fifth Circuit in its initial decision in this case found that the chart was filled with "patent inaccuracies" and that "[i]t does not amount to a convincing showing by a statistically fair exhibit of earnings equality" (footnote omitted). App. 89. The reasons for the appellate court's rejection of the chart were carefully described, id., 80-83. It is important to note that the Steelworkers seriously misstate the Fifth Circuit's ruling regarding the chart, Brief 21a-22a. The Steelworkers indicate that the Fifth Circuit did not find "clearly erroneous" the district court's conclusion that the chart was a "rough index" of the earnings potential of the departments. In fact, the Fifth Circuit simply found that the district court was not wrong in describing what the "chart shows," emphasis in

footnote omitted. 431 U.S. at 356. The system presented in Teamsters, the division

---

90/ Continued

original. App. 82. However, this was not significant since the Fifth Circuit went on to find that the "chart contained patent inaccuracies" in representing the record evidence. App. 89.

Second, the Fifth Circuit in its 1976 opinion properly rejected the gross earnings evidence presented by Pullman-Standard as "indicia of even rough wage parity in 1973" (emphasis added, footnote omitted) because the company did not consider "seniority, overtime and time worked." App. 99, see also App. 99 n. 48.

Third, the Fifth Circuit remanded the case in 1976 for the district court to consider specifically the relative economic effect of the system on blacks and whites. App. 97-100. In light of the "patent inaccuracies" of the district court's chart on earnings and its "inexplicab[le]" discussion of earnings, App. 92-98, the Fifth Circuit carefully defined the nature of the "prima facie inquiry" in order "to eliminate the likelihood" that "[e]rrors apparent in prior proceedings" would "recur on the reconsideration we now mandate." App. 90. However, the district court failed to follow the mandate and the prior errors did recur. Specifically, the lower

of city drivers and line drivers into separate units, was simple and universally applied, id., 356 n. 42. Where, as at Pullman-Standard, a plant contains hundreds of jobs separated into more than twenty departments and several bargaining units, the inferences[91/] concerning motivation are often more difficult to draw.

90/ Continued

court did not examine the relevant evidence of the economic harm of the seniority system. Such an examination "is especially pertinent here" where "in general blacks have more seniority than whites." App. 99.

91/ Unlike a finding that a system was specifically adopted or maintained with a discriminatory purpose, see section 3, supra, a determination of "irrationality" would not necessarily compel a conclusion that a system is non-bona fide but rather would lead to an inference that the system was designed with a discriminatory purpose. This follows from the fact that Title VII proscribes discrimination but does not mandate rationality. However, there is a logical inference that an irrational system which has a discriminatory effect was created with the intent to achieve that effect.

As a practical matter, in a plant as large as the Bessemer plant there are many alternatives which may be deemed an "appropriate" unit by the NLRB or may be consistent with the practices in some other plant. In this context, an inference of discriminatory intent may be compelled not only in the case where an irrational practice is adopted but also in the case where an alternative which promotes segregation is selected from among several "rational" alternatives. What the Company and Unions intend "may be plain from the results [their] actions achieve, or the results they avoid." Personnel Administrator of Mass. v. Feeney, 442 U.S. at 279, n. 24; see United States v. Texas Education Agency, 564 F.2d 162, 166 (5th Cir. 1977), cert. denied, 443 U.S. 115 (1979).

There are several critical facts relevant to an evaluation of the rationality of the divsion of the Bessemer plant into separate bargaining units represented by the Steelworkers and the Machinists. First, the splitting of the pre-unionization departments, Die and Tool and Maintenance, into two parts with each subpart represented by a separate union created additional one-race departments. Second, the division of these departments was unique among the plants operated by Pullman-Standard. App. 35, 11. Third, the Machinists sought to pick and choose among production jobs for inclusion in its unit, see section B. 2.b, supra. Fourth, the Machinists sought to include only those jobs staffed by whites and to exclude expressly those jobs staffed by blacks, see see pp. 26-31, supra. Fifth, just after

the NLRB in its 1941 certification included in the Machinists' unit several jobs staffed by blacks which were functionally related to jobs the Machinists had claimed, the Machinists entered into an agreement with the Company and the Steelworkers which transferred to the Steelworkers' unit all jobs staffed by blacks, see section B. 2.b, supra. Sixth, in keeping with its racially exclusionary membership policies, the Machinists achieved an all-white bargaining unit.

The district court refused to examine this evidence of the manipulation of jobs according to the race of the incumbents because the Company and the Steelworkers "are not chargeable with responsibility for those events" and because the division of the plant into bargaining units "was ... required by a specific decision of the NLRB

and the outcome of elections." App. 36. As discussed earlier, the district court erred in refusing to consider the motives and actions of the Machinists in assessing whether the system was adopted or maintained with an intent to discriminate, see p. 94-95, supra. Furthermore, the district court erred in failing to analyze the certification process and to determine whether racial considerations infected the process. Teamsters imposes a duty to examine fully the genesis of the system, its rationality and the relevant historical background. The district court contravened that duty when it erected NLRB certification as a bar to exmining the genesis and rationality of the seniority system. The determination that a system may be "appropriate" and lawful under the National Labor Relations Act, 29 U.S.C. §§ 151, et

seq., does not preclude a finding that the system is unlawful under Title VII. Cf. Alexander v. Gardner-Denver Company, 415 U.S. 36, 47 (1974) ("Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination," (footnote omitted); Taylor v. Armco Steel Corporation, 429 F.2d 498, 499 (5th Cir. 1970). Moreover, if the precedents of the NLRB are properly understood, then it becomes clear that the Board did not sanction the racial consequences of the bargaining unit division and that a division along racial lines was contrary to general principles which the Board had established.

When the NLRB certifies an appropriate unit, the Board does not determine "the only appropriate unit, or the ultimate

unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate'." Morand Bros. Beverage Co., 91 NLRB 409, 418, enforced, 190 F.2d 576, 581 (7th Cir. 1951). The units certified by the Board were not, as the district court stated, "required" by the Board. Rather, the units reflected the desires of the petitioning unions as well as general considerations used by the Board in determining an appropriate unit. Moreover, the Unions and the Company failed to abide by the original NLRB certification. The parties gerrymandered the certification and established an all-white bargaining unit for the Machinists.[92/]

92/ This private agreement between the Machinists, Steelworkers and Pullman-Standard was submitted for the approval of the NLRB. JA 170-71, see section B. 2. b, supra. Where a supplemental agreement has the consent of all interested parties and

In 1941 it was not the practice of the NLRB to refuse to certify a union which was likely to represent its employees unfairly, or which had discriminatory admission policies.[93/] The NLRB did have a policy

---

92/ Continued

goes unchallenged, the NLRB would have no occasion to investigate the agreement. Where the unions are in agreement as to the scope and composition of the unit, or where the employer enters no objection, the Board generally finds appropriate the agreed upon unit. See e.g., 7 NLRB ANN REP. 60 (1942); 8 NLRB ANN. REP. 53 (1943); 9 NLRB ANN. REP. 33 (1944).

93/ The racially discriminatory membership policies of the Machinists were notorious, n. 24 and accompanying text, supra. See also, Brashear Freight Lines, Inc., 13 NLRB 191 (1939). However, the Board maintained that it had "no express authority to remedy undemocratic practices within the structure of union organizations," and lacked "authority to insist that labor organizations admit all the employees they purported to represent to membership, or to give them equal voting rights ...." Larus and Brother Co., 62 NLRB 1075, 1082 (1945). Consequently, the Board considered evidence of a union's admission

against certifying avowedly discriminatory bargaining units.[94/] The policy, however, was not enforced unless the intention to exclude black workers from the bargaining unit (not merely union membership) was explicit and overt.

For example, the Board certified unions notwithstanding allegations of past

---

93/ Continued

policies irrelevant to certification proceedings and routinely rejected offers of proof that the union's membership policies were racially discriminatory. Veneer Prods, Inc., 81 NLRB 492 (1949); Pacific Maritime Association, 112 NLRB 1280 (1955).

94/ "The color or race of employees is an irrelevant and extraneous consideration in determining, in any case, the unit appropriate for the purposes of collective bargaining. We have consistently refused to delimit units on the basis of race .... [To allow race to be a factor] would be contrary to the spirit of the Executive Order [No. 9346] and the established principles of this Board," Matter of U.S. Bedding, 52 NLRB 382, 388 (1943) (emphasis added).

discriminatory representation, Coleman Co., 101 NLRB 120 (1952), and of discriminatory denials of membership Norfolk Southern Bus Corp., 76 NLRB 488 (1948); Texas and Pac. Motor Transportation Co., 77 NLRB 87 (1948). But where the petition for representation itself expressly proposed to exclude blacks from the bargaining unit on the basis of race, Larus and Brother Co., 62 NLRB 1075 (1945), Aetna Iron and Steel Co., 35 NLRB 136 (1941), or where evidence was introduced that the designation of units was based upon distinctions of race, Union Envelope Co., 10 NLRB 1147 (1939), Utah Copper Company Co., 35 NLRB 1295 (1941); Matter of U.S. Bedding Co, 52 NLRB 382 (1943), then the Board withheld certification of the proffered units.

If a union camouflaged the racial basis for the selection of a unit, the NLRB

did not look behind simple denials of racial purpose and accepted representations by the union's officers that despite discriminatory membership policies the union would represent all employees in the bargaining unit.[95/] See e.g., Georgia Power, 32 NLRB 692 (1941); Carter Manufacturing Company, 59 NLRB 804 (1944); Norfolk Southern Bus, 76 NLRB 488 (1948). In the representational hearing in this case, the Machinists "claim[ed]" "negro cranemen," JA 149, but in fact the Machinists never claimed any position staffed by black

---

95/ The policy of the NLRB was criticized by commentators. Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563, 591-94, 600-04 (1962); Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 156-57, 173-75 (1957); Note, Discrimination in Union Membership 12 Rutgers L. Rev. 543, 545-48 (1958). This policy was later modified, Hughes Tool Co., 147 NLRB 1573, 1577-78 (1964); but see Handy-Andy, Inc., 228 NLRB 447 (1977).

workers. Consistent with the practices of the Board, the NLRB's Trial Examiner stopped any questioning concerning the racial admission policies of the Machinists, JA 145. By failing to admit openly any racial motivation and by its perfunctory remark regarding "negro cranemen" in the representational hearing and then by entering into a private agreement with the Steelworkers and Pullman-Standard which "corrected" the units certified by the NLRB, the Machinists obtained an all-white bargaining unit.

Relying upon the representations of the Machinists and the supplemental agreement of all the parties, the NLRB did not consider whether the bargaining unit proposal was affected by discriminatory motivation. Absent admission by the IAM of its discriminatory purpose, the NLRB's

policy against designating bargaining units by race was successfully thwarted.[96/] The Fifth Circuit correctly ruled that the motivation of the Machinists "to exclude black workers from its bargaining unit" and the manner in "which the two seniority units were set up" were "significant" in determining that the seniority sytem was unlawful. App. 15-16.

The district court briefly discussed the rationality of the departments within the Steelworkers' unit. The court noted

---

96/ While the Board aggressively stated its policy against racially exclusionary bargaining units, 8 NLRB ANN. REP. 57 (1943), the policy was implemented only where the Board was confronted with overtly segregated bargaining units. The NLRB did not approach the certification process as a vehicle for challenging discriminatory union membership policies or for determining whether proposed bargaining units, purportedly neutral, were drawn with an intent to discriminate. See, n.93, supra.

that several of the departments "criticized by the plaintiffs" were found at one of the other plants operated by Pullman-Standard,[97/] but that other departments were unique to the Bessemer plant.[97/] The district court further stated that "[i]ndividual differences in the departmental structure at Pullman's Bessemer and Butler

---

97/ Those departments were the Inspector, Boilerhouse, Railroad and Janitors App. 37. In fact, the district court erred, for the lists of departments of the Hammond and Butler plants do not indicate that there was a Boilerhouse department in either plant. JA 206, 242.

98/ Those departments were the separate Die & Tool and Maintenance departments and Air Brake Pipe shop. App. 35, 37. In addition to these departments noted by the district court, there was no Boilerhouse department at the other plants, nor was there a separation of the Steel Miscellaneous and Steel Stores departments in the other plants. JA 206, 242. The district court specifically declined to find that it was rational to have separated these departments. App. 31-32, see also section B. 3. b.

plants, such as they are, do not establish that either is irrational or inconsistent with industry practices"; rather, the court suggests that "the ultimate objective should be to comprehend the gestalt of the system." App. 37. In fact, the purpose of the Unions and Company may best be understood in the context of the racial gerrymandering of departments during the periods of increasing importance in departmental structure and seniority: the certification of the Unions in 1941 and the changes in the mid-1950s in the Steelworkers' unit, see section 3, supra. As the Fifth Circuit stated, "the creation of the various all-white and all-black departments within the USW unit at the time of certification and in the years thereafter" was "significant". App. 16.

II.

THE FIFTH CIRCUIT PROPERLY EXERCISED ITS APPELLATE FUNCTION TO CORRECT ERROR BY A DISTRICT COURT.

A. The determination of the proper standard of appellate review begins with Rule 52(a), Federal Rules of Civil Procedure, which provides, in pertinent part,

> In all actions tried upon the facts without a jury ... [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

However, an "'[i]ssue of fact' is a coat of many colors", Watts v. Indiana, 338 U.S. 49, 51 (1949), and an appellate court must pay careful attention to the particular type of "fact" which is presented for review. If a district court "premise[s] its ... finding ... on an erroneous interpretation of the standard to be applied

...," the clearly erroneous rule does not apply, and the findings may not stand. United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960); United States v. General Motors, 384 U.S. 127, 142 (1966); Kelley v. Southern Pacific Co., 419 U.S. 318, 323 (1974).[99] Similarly, a finding of

> so-called ultimate "facts" more clearly implies the application of standards of law ... Though labelled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus the conclusion that may appropriately be drawn from the whole mass of evidence is not always the

---

99/ Shortly after the promulgation of Rule 52(a), Judge Learned Hand in an opinion reversing a lower court finding, stated "as we view it [that the finding was governed by a legal principle] the cause comes before us as it did before the district judge; like him, we have only to decide what measure of care the situation imposed." Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co., 139 F.2d 288, 290 (2nd Cir. 1943), cert. denied, 321 U.S. 795 (1944).

> ascertainment of the kind of "fact" that precludes consideration by this Court 100/ (footnote added). Baumgartner v. United States, 322 U.S. 665, 671 (1944) (Frankfurter, J.).

The application of a legal standard by a district court "is not a question of fact within Rule 52(a)." Karavos Compania, Etc. v. Atlantic Export Corp., 588 F.2d 1, 8 (2nd Cir. 1978) (Friendly, J.). The proper application of Rule 52(a) depends not so much upon terminology --

---

100/ In Baumgartner the Court applied the rule that the "concurrent findings of two lower courts are persuasive proof in support of their judgments," id., 322 U.S at 670. The Court's determination that findings of ultimate facts may not be due on appeal the same deference as subsidiary facts has provided guidance for the application of Rule 52(a). See e.g., Schultz v. Wheaton Glass Company, 421 F.2d 259, 267 (3rd Cir. 1970); Galena Oaks Corporation v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954); Christopher v. State of Iowa, 559 F.2d 1135, 1138 n. 13 (8th Cir. 1977).

"ultimate" or "subsidiary" fact or conclusion of "law" or "fact" -- as upon an analysis of whether the ruling resulted from the application of a standard of law. "Insofar as the conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law." United States v. Singer Manufacturing Co., 374 U.S. 174, 194 n. 9 (1963).

If findings are covered by Rule 52(a), the appellate court has a duty to review these findings in order to determine whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364,395 (1948). While facts based upon different forms of evidence, "live" witness testimony, deposition

or documentary, are covered by the clearly erroneous rule, cf. United States v. Singer Manufacturing Co., 374 U.S. at 194 n. 9, an appellate court in assessing the validity of the lower court's findings should consider the type of evidence upon which the lower court had relied. For example,

> the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) ... plays only a restricted role ...[in]... a "paper case."

United States v. General Motors Corporation, 384 U.S. 127, 141 n. 16 (1966). Rule 52(a) itself takes into account the relative advantages of trial and appellate courts in assessing different types of evidence by emphasizing that "... due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The distinction between findings based upon "paper" and

those based upon "credibility of witnesses" carried over from the practice in equity where the findings of the trial court based upon credibility of witnesses "had great weight with the appellate court." United States v. United States Gypsum Co., 384 U.S at 395, see District of Columbia v. Pace, 320 U.S. 698, 702 (1944).[101/]

101/ The issue is not, as posed by the Steelworkers, Brief 31 n. 41, whether Rule 52(a) applies to "reviewing district court findings respecting discriminatory purpose." The issues regarding the proper application of Rule 52(a) concern whether the district court used an incorrect legal analysis in evaluating the evidence and whether the appellate court properly reviewed the findings of the district court given the nature of the evidence which was before the lower court.

Contrary to the assertion of the Steelworkers, the circuit courts agree upon the fundamental principles for the application of Rule 52(a). As the Fifth Circuit stated in this case, "[w]here findings ... are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply ...." App. 15 n.6. See also Karavos Campania, etc. v.

B. The Fifth Circuit properly applied Rule 52(a) to this case; it

---

101/ Continued

Atlantic Export Corp., 588 F.2d 1, 8 (2nd Cir. 1978); Sears, Roebuck and Co. v. Johnson, 219 F.2d 590, 591 (3rd Cir. 1954); Schultz v. Wheaton Glass Company, 421 F.2d 259, 267 (3rd Cir. 1970) ("We are not, however, bound [to apply Rule 52(a)] by conclusions which are but legal inferences from facts"); Poyner v. Lear Siegler, Inc., 549 F.2d 955, 959 (6th Cir. 1976); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 686 (6th Cir. 1979), cert. denied, 101 S. Ct. 783 (1981) ("[W]hether prior discrimination occurred is a conclusion of law based on subsidiary findings of fact"); Stewart v. General Motors Corp., 542 F.2d 445, 449 (7th Cir. 1976); United States v. City of Chicago, 549 F.2d 415, 425 (7th Cir.), cert. denied, 434 U.S. 875 (1977); Christopher v. State of Iowa, 559 F.2d 1136, 1138 (8th Cir. 1977); Stevenot v. Norbert, 210 F.2d 615, 619 (9th Cir. 1954).

Moreover, the circuit courts agree that where, as in this case, "the findings of a trial court are based on documentary, rather than oral evidence, they do not carry the same weight on appellate review," although Rule 52(a) applies. Jennings v. General Medical Corp., 604 F. 2d 1300, 1305 (10th Cir. 1979); see also Orvis v. Hig-

recognized that "[f]indings of fact by by the district court in Title VII cases

---

101/ Continued

gins, 180 F.2d 537, 539 (2nd Cir. 1950); City of Mishawaka, Ind. v. Am. Electric Power Co., 616 F.2d 976, 979 (7th Cir. 1980).

The three cases which the Steelworkers cite, Brief 31-32 n. 41, as being in conflict with this case, all concerned allegations of discrimination in the promotion of college teachers and all primarily involved the district court's determination of the credibility of witnesses and not the misapplication of legal principles. Sweeney v. Bd. of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980); Manning v. Trustees of Tufts College, 613 F.2d 1200 (1st Cir. 1980); Kunda v. Muhlenburg College, 621 F.2d 532 (3d Cir. 1980). In fact, in Sweeney, a decision cited in both Manning and Kunda, the court expressly stated that Rule 52(a) applies "except where there is some indication that the court misconceived the legal standards," (emphasis added) 604 F.2d at 109 n. 2. In Kunda the issue of whether Rule 52(a) applied was not even before the court since the appellant had conceded its application to the pertinent issue. 621 F.2d at 544.

are not to be set aside unless they are clearly erroneous ... that is, unless the appellate court is 'left with the definite and firm conviction that a mistake has been committed.'" App. 15 n. 6. Applying this standard the Court of Appeals reversed the trial court's 1978 finding of no post-act assignment discrimination because it was "factually unsubstantiated" by the record. App. 8. The Court continued that "[w]here findings, however, are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand." App. 15 n.6. The Fifth Circuit determined that the district court's conclusion that the seniority system was neither created nor maintained with a discriminatory purpose was based upon an erroneous appli-

cation of the law.[102] If this Court agrees that the district court misapplied the pertinent legal standard, then it is not necessary to reach the question of whether

---

102/ The district court made three principal errors of law specified by the Court of Appeals. The district court failed to consider the motives of the Machinists App. 13-16, failed to consider the degree of segregation fostered by the seniority system or its economic harm upon blacks, App. 10, and to give "due consideration" to the development of separate seniority units and the IAM's role in the development of those units. App. 16; 11. The Court of Appeals' discussion of these issues does not use the words "clearly erroneous" because the district court made no findings of fact on these issues, which it erroneously felt to be inapplicable, as a matter of law, to a determination of the legality of the seniority system.

The district court's erroneous application of legal principles contributed to other erroneous conclusions. The district court failed to consider adequately the creation and maintenance of numerous one-race departments, to consider the racial consequences of changes in the seniority system after the November 1941 NLRB certification, and to examine fully the racial motivations of the Unions and Company. See generally Argument I, supra.

the district court's findings were clearly erroneous, and this Court must affirm the Fifth Circuit unless it concludes that the panel applied an improper legal standard. Kelley v. Southern Pacific Co., 419 U.S. at 323.

The Fifth Circuit further concluded that

> [a]n analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made (footnote omitted). App. 15.

The Court of Appeals based its ruling not only upon the district court's faulty application of legal standards but also upon its review of the evidence presented on the bona fides of the seniority system. As in General Motors, the evidence was almost entirely documentary; the record presents a "paper case," not a contest

between the credibility of witnesses.[103/] As a result of the nature of the issue, the

---

103/ In presenting in its Petition for a Writ of Certiorari the issue as to whether Rule 52(a) was properly applied by the Fifth Circuit, the Steelworkers primarily relied upon two opinions, in which lower court findings of "intent" were reviewed. United States v. Yellow Cab Co., 338 U.S. 338 (1949) and United States v. Oregon State Medical Society, 343 U.S. 326 (1952). Petitioner 22-23. In quoting passages from these cases the Steelworkers omitted critical portions which distinguish these cases from the case at bar; the omitted portions are underlined:

"This Court has already held that the clearly erroneous standard of Rule 52(a), applies generally in reviewing '[f]indings as to the design, motive and intent with which men act [since they] depend peculiarly upon the credit given to witnesses by those who see and hear them', United States v. Yellow Cab Co., 338 U.S. at 341," Steelworkers' Petition 22.

"[T]his Court [has admonished] that 'no case' is more 'appropriate for adherence to [Rule 52(a)]' than one involving 'a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.' Oregon State Medical Society, 343 U.S. at 332 (1952)." Steelworkers' Petition 23.

motives of the Unions and the Company in the design and maintenance of a seniority system during the 1940s and 1950s, voluminous documentary evidence was presented but not a single witness testified before the district court regarding the development of the seniority system, see pp.9-10.

The district court's legal errors influenced its view of the ultimate question, the legality of the seniority system, in several different ways. The court failed to examine pertinent evidence,[104]

103/ Continued

The truncated quotation of these cases by the Steelworkers -- cited again in their Brief 34, 22 n. 42 -- illustrates the fallacy in the arguments presented by the Steelworkers. These cases in fact support the standard of appellate review applied by the Fifth Circuit to this case, where the district court was presented largely with documentary evidence and where the district court improperly applied legal principles.

104/ For example, the court ruled that the motives of the Machinists, one of the very

refused to draw inferences from relevant evidence,[105/] and failed to attribute the proper legal significance to evidence[106/] or to the historical context of the evidence,[107/] and misconstrued the proper analysis for determining discriminatory purpose from objective circumstantial evidence.[108/] See generally Argument I, supra.

104/ Continued

institutions which contributed to the development of the seniority system, were irrelevant.

105/ For example, the court ruled that the NLRB certification insulated the bargaining unit system from an examination of its "rationality" or the effect of racial motivations on its development.

106/ For example, the court did not consider the degree of segregation fostered by the seniority system.

107/ For example, the court did not consider the historical context of the creation in 1941 and from 1952 through 1954 of numerous one-race departments.

108/ For example, the court did not consider whether there was a causal connec-

The Fifth Circuit here, as did the Sixth Circuit in Brinkman v. Gilligan 583 F.2d 243, 248, 251-52 (1978)[109] properly reversed the district court's finding that there was no intentional discrimination and remanded the case for a determination of an appropriate remedy. This Court agreed that the district court had "ignored the legal significance" of relevant evidence and affirmed the Sixth Circuit. 443 U.S. at 535-37, sub nom, Dayton Board of

---

108/ Continued

tion between the general discriminatory practices and the "genesis" of the seniority system; nor did the court consider all the practices of the Steelworkers in evaluating their objectives in the development and maintenance of the system.

109/ The Sixth Circuit reversed the district court's determination that the school board had not intentionally discriminated throughout the system because, inter alia, the lower court had not given proper legal significance to the empirical, historical and circumstantial evidence.

Education v. Brinkman [redacted]

Similarly, the Fifth Circuit properly reviewed the decision of the lower court [redacted] in this case and its remand of the action for a determination of an appropriate remedy should be affirmed.[110/]

110/ The Fifth Circuit properly did not remand the action for a fourth trial on the issue of liability. The court reviewed the documentary evidence and concluded that as a matter of law, the seniority system was unlawful. In United States v. General Motors Corp., 384 U.S. at 142 n. 16, the Court "resort[ed] to the record not to contradict the trial court's findings of facts, ... but to supplement the court's factual findings and to assist [it] in determining whether they support the court's ultimate legal conclusion that there was no conspiracy." After concluding that there was a conspiracy, the Court remanded in order that appropriate relief might be fashioned, id., 148. Similarly, in this case efficient judicial administration requires that after 10 years of litigation the issue of liability be finally decided. See Levin v. Mississippi River Fuel Co., 386 U.S. 162, 170 (1967); Bigelow v. Virginia, 421 U.S. 809, 826-27 (1972).

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
PATRICK O. PATTERSON
JUDITH REED
Suite 2030
10 Columbus Circle
New York, New York 10019

ELAINE JONES*/
BARRY L. GOLDSTEIN
C. LANI GUINIER
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005
(202) 638-3278

OSCAR W. ADAMS, III
2121 Eighth Avenue, North
Birmingham, Alabama 35208

*Counsel of Record

APPENDIX A

To some extent the Company and, to a lesser degree, the Steelworkers relied on a chart at JA 336, which purports to relfect changes in departmental organization at Pullman-Standard. Steelworkers' Brief 5 n.7, Company Brief 10. While the chart represents an attempt to depict graphically alterations in departmental configurations from the time of unionization in 1941 to the present, the attempt fails because of numerous inaccuracies in the chart.

Respondents have set forth elsewhere in this brief the changes in department structure which are central to the issue before this Court. See pp. 32-34, 41 n.46, 42-45. However, some of the factual errors that appear in the chart are set forth in this Appendix in an effort to avoid the

confusion and misrepresentation of the factual record which reliance on the chart will most certainly produce.

A. Two Wheel and Axle departments were created in 1941, both of which were created by the division of a department with the same name. After a swap of jobs between the Machinists and the Steelworkers subsequent to the NLRB certification, the newly created all-white Wheel and Axle department came under the jurisdiction of the IAM; whereas the all-black Wheel and Axle department became a separate department under the jurisdiction of the Steelworkers. The chart mistakenly reflects only one Wheel and Axle department in 1942, under the jurisdiction of the Machinists. See pp. 29-32, supra.

B. The departments which were certified to the NLRB - those which existed when Pullman-Standard was unionized and when the first union contracts were signed in 1942 - are reflected in the voting list provided to the NLRB. Plaintiffs' Exhibit 1, JA 243-251. There were also overtime work lists and other configurations of employees used for cost accounting purposes, as distinguished from seniority lists. These employee groupings did not make up seniority units. Company Exhibit 5 (1978 Trial); see also, App. 34 n.12 ("although Wheel and Axle and Truck were listed as a single department for cost accounting purposes, for purposes of seniority they are two departments"). The chart erroneously includes six such employee groupings in 1942, not certified

to the NLRB, which were not departments for purposes of seniority: namely, Railroad, Tool Room, Miscellaneous Stores, Truck/ Tractor, Steel Stores and Crane Service. Plaintiffs' Exhibit 1, JA 243-251.

C. The tool room jobs which did not constitute a separate department in 1942, or any other time subsequent thereto, were ceded to the Steelworkers' unit from the Machinists in 1944. The chart mistakenly shows these jobs as (1) a separate department in 1942 and (2) being ceded to the Steelworkers from the Electrical Workers' unit in 1944. Id., JA 174-75.

D. The IBEW bargaining unit was decertified in 1946 and its jobs were merged into the USW unit. The chart errs in placing the IBEW decertification in 1944. App. 36 n.16, p. 36, supra.

E. The Air Brake Pipe department was created at unionization in 1941, was represented by the Machinists, and became a part of the Steelworkers' unit in 1944. There is no record support for chart delineation of the Air Brake Pipe shop as a separate departmental seniority unit in the years 1944 to 1946. See nn.32, 41, 46; JA 174-75.

F. The Air Brake Pipe shop was reestablished as a separate department in 1954. The chart indicates that the department was created from jobs in one department, Steel Erection. In fact, the department was created by joining jobs from two departments, Shipping Track and Steel Erection. Compare Plaintiffs' Exhibits 8 and 9; see p. 42, supra.

G. The Steel Miscellaneous department first appeared on a February 1953 seniority list which supplemented the 1952 seniority list. Plaintiffs' Exhibit 7 (1978 Trial.) The chart incorrectly shows that the Steel Miscellaneous department was created in June 1952. The district court also made this error. App. 32.

APPENDIX B

TABLE 1. ALLOCATION OF EMPLOYEES BY DEPARTMENT IN 1964 AND ANALYSIS OF WHETHER A DEPARTMENT IS RACIALLY IDENTIFIABLE BECAUSE IT CONTAINS A "SERIOUS DISPROPORTIONALITY" BETWEEN THE EXPECTED AND ACTUAL NUMBER OF BLACKS

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected no. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Air & Brake Pipe Shop	35	35	0	12	4.265	10 in 10^6	*
Boiler House	1	1	0	0	[.407]	.658	
Die & Tool (CIO)	10	0	10	3	[2.164]	.015	*
Die & Tool IAM	78	78	0	27	6.366	9.7 in 10^{11}	*
Forge	95	53	42	32	2.058	.020	*
Inspection	21	21	0	7	3.303	4.78 in 10^4	*
Janitors	12	0	12	4	[2.478]	.006	*
Lumber Stores	29	24	5	10	1.925	.027	
Maintenance (CIO)	138	106	32	47	2.725	3.22 in 10^3	*
Maintenance IAM	93	93	0	32	6.952	1.80 in 10^{12}	*
Misc. Stores	14	6	8	5	[1.810]	.035	
Mobile Crane	5	1	4	2	1.648	.050	
Paint & Shipping Track	272	143	129	93	4.601	2.10 in 10^6	*
Plant Protection	14	14	0	5	[2.768]	2.82 in 10^3	*
Power House	5	5	0	2	1.158	.123	
Press	73	17	56	25	7.658	9.44 in 10^{15}	*
Punch & Shear	176	32	144	60	13.319	8.97 in 10^{41}	*

(Continued on next page)

TABLE 1 (Continued)

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected No. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Railroad	19	10	9	6	1.211	.113	
Steel Constr. Steel Erection	207	39	168	71	14.245	$2.41 \text{ in } 10^{46}$	*
Steel Misc.	304	63	241	104	16.571	$5.65 \text{ in } 10^{62}$	*
Steel Stores	100	4	96	34	13.029	$4.18 \text{ in } 10^{39}$	*
Template	59	10	49	20	7.911	$1.28 \text{ in } 10^{15}$	*
Truck	5	5	0	2	[1.158]	.123	
Welding	24	0	24	8	6.796	$5.38 \text{ in } 10^{12}$	*
Wheel & Axle	1853	1655	198	634	21.333	$1 \text{ in } 10^{99}$	*
Wood Erection	40	25	15	14	.441	.330	
Wood Mill	163	90	73	56	2.851	$2.18 \text{ in } 10^{3}$	*
TOTAL	30	20	10	10	.099	.460	
	3075	2550	1325				

Conclusions: Of the 1325 black employees, 96% or 1,274 were in the 19 racially identifiable departments. Of the 2550 white employees, 96% or 2453 were in the 19 racially identifiable departments.

TABLE 2. (Continued)

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected no. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Railroad	11	4	7	5	1.389	$8.24 \text{ in } 10^{2}$	
Shipping Track	15	7	8	6	.815	.208	
Steel Constr.	91	18	73	39	7.191	$3.22 \text{ in } 10^{13}$	*
Steel Erection	216	42	174	93	11.178	$2.61 \text{ in } 10^{29}$	*
Steel Misc.	71	2	69	30	9.239	$1.24 \text{ in } 10^{20}$	*
Steel Stores	31	5	26	13	4.608	$2.03 \text{ in } 10^{6}$	*
Template	4	4	0	2	[1.826]	$3.39 \text{ in } 10^{2}$	
Truck	26	0	26	11	5.881	$2.04 \text{ in } 10^{9}$	*
Welding	402	325	77	172	9.624	$3.17 \text{ in } 10^{22}$	*
Wheel & Axle	18	11	7	8	.345	.365	
Wood Erection	132	88	44	57	2.223	$1.31 \text{ in } 10^{2}$	*
Wood Mill	26	22	4	11	2.836	$2.28 \text{ in } 10^{3}$	*
TOTAL	1579	907	672				

Conclusions: Of the 672 black employees, 89%, or 601, were in the 18 racially identifiable departments. Of the 907 white employees, 83% or 754 were in the 18 racially identifiable departments.

TABLE 2. ALLOCATION OF EMPLOYEES BY DEPARTMENT IN 1956 AND ANALYSIS OF WHETHER A DEPARTMENT IS RACIALLY IDENTIFIABLE BECAUSE IT CONTAINS A "SERIOUS DISPROPORTIONALITY" BETWEEN THE EXPECTED AND ACTUAL NUMBER OF BLACKS

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected No. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Air Brake Pipe Shop	19	19	0	8	3.779	$7.87 \text{ in } 10^5$	*
Boiler House	3	3	0	1	[1.502]	$6.66 \text{ in } 10^2$	
Die & Tool (CIO)	5	0	5	2	[1.549]	$6.07 \text{ in } 10^2$	
Die & Tool IAM	43	43	0	18	7.563	$1.97 \text{ in } 10^{14}$	*
Forge	56	26	30	24	1.612	$5.35 \text{ in } 10^2$	
Inspection	20	20	0	8	3.877	$5.29 \text{ in } 10^5$	*
Janitors	9	0	9	4	[2.487]	$6.44 \text{ in } 10^3$	*
Lumber Stores	24	17	7	10	1.360	$8.69 \text{ in } 10^2$	
Maintenance (CIO)	63	48	15	27	3.063	$1.10 \text{ in } 10^3$	*
Maintenance IAM	32	32	0	14	4.904	$4.7 \text{ in } 10^7$	*
Misc. Stores	9	4	5	4	[.439]	.330	
Mobile Crane	4	2	2	2	[.188]	.547	
Paint	110	74	36	47	[2.158]	$1.55 \text{ in } 10^2$	*
Plant Protection	10	10	0	4	2.82	$2.04 \text{ in } 10^3$	*
Power House	4	4	0	2	[1.247]	.106	
Press	44	12	32	19	3.996	$3.22 \text{ in } 10^5$	*
Punch & Shear	81	65	16	35	4.211	$1.22 \text{ in } 10^5$	*

(Continued on next page)

Methodology

The method of analysis used to determine "serious disproportionality" is the one suggested in Hazelwood School District v. United States, 433 U.S. 299, 311 n. 17 (1977), and Castaneda v. Partida, 430 U.S. 482, 497 n. 17 (1977). This analysis which employs the statistical hypothesis of nondiscrimination (that "decisions were being made randomly with respect to race") was applied to the racial allocation of employees in each department. The statistical hypothesis of nondiscrimination implies that, as regards the attribute of race, the employees of any particular department ought to be viewed as a random sample drawn from the total workforce. It further implies that black employees should be represented in each department in the same proportion as their representation in

the total workforce, but for chance factors.[1/] If B is that proportion, and N is the number of employees in a particular department, the expected number of blacks, e, is B times N; this is then compared with the corresponding actual observed number of blacks, o. The standard deviation, S, needed for this comparison is the square root of N times B times W, with W being the proportion white employees in the total workforce. The quantity o minus e, divided by S, yields a ratio, z, which measures the discrepancy between observed and expected

---

1/ The use of the hypothesis is fully justified on this record where there is no finding that there was any skill difference which explains the disparity in departmental assignments between black and white employees. App. 81. In fact on this record it is admitted that assignments were based on race and that the skills of black workers would simply not be considered when filling "white" jobs. App. 39.

numbers in terms of the number of standard deviations by which they are apart. This ratio can be referred to the normal probability distribution to ascertain the probability of such a discrepancy occurring by chance. A discrepancy of more than two or three standard deviations "undercut[s] the hypothesis that decisions were made randomly with respect to race." Castaneda, 430 U.S. at 497, n. 17.

This analytical process will be illustrated using the Forge Department in 1964. For that year, B ÷ 1325 - 3875 or .3419. Since that department then had 95 employees, e = .3419 times 95, or 32.5, versus an observed number, 42, of blacks. The standard deviation is the square root of 95 times .3419 times .6581, or 4.6234. The ratio, z, has the value (42 - 32.5) ÷ 4.6234 = 2.0548; i.e., the

disparity is one of slightly more than two standard deviations. The probability is that such a disproportionate racial distribution would occur by chance in only 2 out of 100 samples. See Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 Harv. L. Rev. 793, 800 (1978); Dawson, Are Statisticians Being Fair to Employment Discrimination Plaintiffs? 21 Jurimetrics 1, 7-8, 20 (1980).

Carrying out this process for each of the 29 departments in 1956, we find disparities of more than two standard deviations in 18 of them, which include 89% of the black employees. In 1964 there were 28 departments, 19 with disparities greater than two standard deviations. These 19 departments include 96% of the

black employees.[2/]

It should be noted that, in these analyses above, the normal distribution model is not applicable when the expected number is less than 5. See P. Hoel, Introduction to Mathematical Statistics 82 (4th ed. 1971). When this is the case, the probability model that should be used is the hypergeometric, but when, as here, the sample sizes (total numbers of em-

---

2/ In addition to the 19 departments in 1964 and the 18 departments in 1956 which were racially identifiable according to the Castaneda-Hazelwoood analysis, there were other departments which had historically included employees of one race. In 1964 there were three such departments, Boilerhouse, Powerhouse, and Template, and in 1956 there were four such departments, Boilerhouse, Die and Tool (CIO), Powerhouse, and Template. Using this statistical method the size of these departments does not permit a statistical conclusion of "identifiability".

ployees in the workforce, by race) are large, the more convenient binomial model may be used. Hoel, supra, at 67-68. The binomial was used, as needed, for half a dozen departments in each of the two years. The probabilities thus obtained were referred to the normal probability curve to get an equivalent number of standard deviations.[3/]

3/ The "number of standard deviations" on Tables 1 and 2 has been placed in brackets whenever the binomial model was used as described above. No department was determined to be racially identifiable unless the probability of the observed racial composition occurring by chance would be less than .05 (5 chances out of 100).

Source of Data

The number of employees in each department for the year 1956 was taken from plaintiffs' exhibit 11 (1978 Trial), and for the year 1964 from plaintiffs' exhibit 2 (1974 Trial). Both of these exhibits are seniority lists which were maintained by the Company. The racial identification of the employees was determined from the employees' numbers which were assigned on the basis of race. See n.11, supra.

TABLE 3. RANKING OF EARNINGS OPPORTUNITIES IN DEPARTMENTS AS OF 1964 ON THE BASIS OF MEDIAN JOB CLASS, AND THE ACCUMULATED PERCENTAGE OF BLACKS AND WHITES IN A SPECIFIC DEPARTMENT AND ALL OTHER DEPARTMENTS WITH A HIGHER MEDIAN JOB CLASS

Department	Median Job Class	Median Job of Blacks	No. Blacks	No. Whites	% Black	% White	[Accumulated %] Black	White
Template	18	---	0	5	0	100	0.0	0.2
Power House	16	---	0	5	0	100	0.0	0.4
Die and Tool (IAM)	14	---	0	74	0	100	0.0	3.3
Maintenance (CIO)	13	4	32	106	23.2	76.8	2.4	7.5
Inspection	12	---	0	21	0	100	2.4	8.3
Welding	10	6	198	1655	10.7	89.3	17.3	73.3
Maintenance (IAM)	10	---	0	92	0	100	17.3	76.9
Boiler House	10	---	0	1	0	100	17.3	76.9
Paint and Shipping Track	7	6	129	143	47.4	52.6	27.0	82.5
Railroad	7	7	9	10	47.4	52.6	27.7	82.9
Steel Erection	6	6	241	63	79.3	20.7	45.9	85.4
Steel Construction	6	6	241	63	81.2	18.8	58.6	86.9
Forge	6	2	42	53	44.2	55.8	61.8	89.0
Wheel & Axle	6	6	15	25	37.5	62.5	62.9	90.0
Air Brake Pipe Shop	6	---	0	35	0	100	62.9	91.4
Truck	6	6	24	0	100	0	64.7	91.4
Miscellaneous Stores	6	7	8	6	57.1	42.9	65.3	91.6
Plant Protection	6	---	0	14	0	100	65.3	92.2
Wood Mill	5	2	10	20	33.3	66.7	66.1	93.3
Did & Tool (CIO)	5	5	10	0	100	0	66.9	93.3
Mobile Crane	5	5	4	1	80.0	20.0	67.2	93.3
Punch & Shear	4	4	144	32	81.8	18.2	78.1	94.1
Wood Erection	4	2	73	90	44.8	55.2	83.6	97.8
Press	4	4	56	17	76.7	23.3	87.8	98.5
Lumber Stores	3	3	5	24	17.2	82.8	88.2	99.5
Steel Miscellaneous	2	2	96	4	96.0	4.0	95.4	99.7
Steel Stores	2	2	49	10	83.1	16.9	99.1	100.1
Janitors	1	1	12	0	100	0	100.1	100.1
Total			1325	2545				

For Table 3 the worker population of the plant was defined as including all workers in non-IAM jobs whose job classes were specified in plaintiffs' exhibit 12 4/ (that is all workers except those on salary) and all workers in the Die and Tool (IAM) and Maintenance (IAM) Departments, excluding Foremen. Job class equivalents for IAM jobs were determined by assigning each IAM job to the job class whose hourly wage (as given in the agreement between the Company and the Steelworkers, November 1,

---

4/ The accumulated percentage figure for each department is determined by adding to the previous number in the column (or to zero, at the top of the chart) the percentage of the plant's workers of the given race who work in the given department. Thus, the figure shows what percentage of the plant's workers of the given race work either in the given department or in those preceding it on the chart. This exhibit lists employees in the Steelworkers' unit by job class.

1965, Company exhibit 263, p. 5, 1978 Trial) was closest to the hourly wage of the given IAM job (as set forth in the agreement between the Company and IAM, November 1, 1965) Plaintiffs' exhibit 29, pp. 55-56, (1978 Trial). See 7 supra. In cases where there was a range of wages for an IAM job, the median wage was used.

The median job class is that job class, below or above which exactly half of the positions held by the workers in the given group fall. Median job classes for each department as a whole, and for the black workers only in each department, have been determined and listed separately. The departments are listed in decreasing order of median job class. Multiple departments with the same median job class are listed in decreasing order of size.

Plaintiffs' Exhibit 12, a list of employees by job class in 1964 totals 74 white employees in Die and Tool (IAM) and 92 white employees in Maintenance (IAM). Plaintiffs' Exhibit 2, which serves as the basis for Table 1 the seniority list for 1964 includes 78 white employees in Die and Tool (IAM) and 93 white employees in Maintenance (IAM). In other respects the exhibits reflect the same number of employees in each department.

Office - Supreme Court, U.S.
FILED
JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1190 and 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED, UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON, et al.,
Respondents.

REPLY BRIEF OF PETITIONER, PULLMAN-STANDARD

SAMUEL H. BURR
Counsel of Record

C. V. STELZENMULLER
D. FRANK DAVIS
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203
(205) 251-3000

F. B. SNYDER
200 South Michigan Avenue
Chicago, Illinois 60604

Attorneys for Petitioner Pullman-Standard

Of Counsel:

THOMAS, TALIAFERRO, FORMAN, BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 1

I. THE BONA FIDES TO BE EVALUATED IS THAT OF PULLMAN AND THE USW IN REACHING THEIR AGREEMENT ON SENIORITY RULES; THE EXISTENCE OF SEPARATE BARGAINING UNITS WAS NOT A PART OF THEIR SENIORITY SYSTEM AND ALLEGED MOTIVES OF THE IAM OR NLRB ARE NOT RELEVANT TO THAT INQUIRY. 1

II. ANY INFERENCE ABOUT MOTIVATION FROM THE DIVISION OF CERTAIN DEPARTMENTS OCCASIONED BY THE IAM CERTIFICATION AND MODIFICATION THEREOF FOR PRACTICAL PURPOSES IS DISSIPATED BY LATER SENIORITY UNIT MERGERS. 10

III. APPENDIX A TO RESPONDENTS' BRIEF CONTAINS NOTHING DETRACTING FROM THE BONA FIDES OF THE PULLMAN-USW SENIORITY SYSTEM. 11

IV. APPENDIX B TO PETITIONERS' BRIEF IS REPLETE WITH STATISTICAL MISINFORMATION AND ERRONEOUS METHOD. IN ADDITION THE STATISTICS DISCUSSED ARE ALL PRE-ACT AND WHAT RESPONDENTS SEEK TO PROVE BY THEM IS BESIDE THE POINT OF BONA FIDES. 13

V. THE DISTRICT COURT'S FINDINGS OF PULLMAN'S COMPLIANCE WITH TITLE VII WERE SUPPORTED BY A FULL AND COMPLETE RECORD. 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 1, 8

Carroll v. United Steelworkers of America, 498 F.Supp. 976 (D. Md. 376, 958-86) 5

Heard v. Mueller Co., 464 F.2d 190 (6th Cir. 1972).... 4

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ..... *passim*

Taylor v. Mueller Co., — —F.2d ——, 26 FEP Cases 1695 (6th Cir., 1981) 4, 5

United Air Lines v. Evans, 431 U.S. 553 (1971) 4, 7

United States v. TIME-DC, 517 F.2d 299 (5th Cir., 1975) 3, 18

United States v. TIME-DC, 4 FEP Cases 77, (N.D. Tex. 1971) 2

United States v. TIME-DC, Inc., 6 FEP Cases 690, (N.D. Tex. 1972) 3

STATUTES:

Labor-Management Relations Act, 29 USCA § 9(b)... 5

Civil Rights Act of 1964, Title VII as amended, 42 USCA §§ 2000e, et seq. 4, 8, 9, 17

§ 703(h) 2, 4, 6, 7, 18

TEXT:

P. Hoel, *Elementary Statistics* (4th Ed.) 180 16

Nos. 80-1190 and 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED, UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON, et al.,
Respondents.

REPLY BRIEF OF PETITIONER, PULLMAN-STANDARD

STATEMENT OF THE CASE

ARGUMENT

I. The Bona Fides To Be Evaluated Is That Of Pullman And The USW In Reaching Their Agreement On Seniority Rules: The Existence Of Separate Bargaining Units Was Not A Part Of Their Seniority System And Alleged Motives Of The IAM Or NLRB Are Not Relevant To That Inquiry.

Pullman's main brief, pages 22-26, dealt with the erroneous approach of the Fifth Circuit in lumping together the seniority rules in the Pullman-USW contract and those in the Pullman-IAM contract, and calling this aggregate *the* seniority system, and among other things, pointed out its inconsistency with the definition of "system" approved in *California Brewers Ass'n* v. *Bryant*, 445 U.S. 598, 606, n.15, as a "complex *unity* formed of many often diverse parts subject to a *common plan* or serving a *common purpose.*" (Emphasis added.) Despite the obvious importance of the hypothesis that there was a single seniority system at Bessemer comprising both the USW and

the IAM seniority rules, respondent's brief addresses not a word to the meaning of system or validity of the hypothesis, but begs the question; assumes it without the slightest attempt at rational justification or evidentiary basis.

We believe the seniority rules agreed on in the Pullman-USW collective contracts, modified from time to time, constitute *the* system whose bona fides is to be determined, and that this determination must be made without reference to the alleged "ritual" of the IAM before 1948[1] or the NLRB orders in the '40's defining and modifying the USW and IAM bargaining units. So vital a question simply should not be begged, but both the Fifth Circuit and respondents assume its answer without any attempt to support it or to answer Pullman's contrary arguments.

Further study convinces us more than ever of the soundness of our reasoned conclusion that the seniority system whose bona fides is in question is the seniority rules within the Pullman-USW bargaining unit and contract, and that matters extraneous to that bargaining unit cannot destroy its § 703(h) immunity. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) establishes this by plain implication. Although not mentioned in this Court's opinion, the lower court opinions in the *Teamsters* litigation show there were separate *IAM* bargaining units and contracts at some of the carrier's terminals at which the Teamsters' seniority rules covered over-the-road and city truck drivers.[2]

---

[1] This was never introduced into evidence but respondents unsuccessfully sought to have it judicially noticed after conclusion of the third trial and after all parties rested. (Pet. App. 24a, n.1; JA 346-350).

[2] *United States* v. *TIME-DC, Inc.*, 4 FEP Cases 77, 78 (N.D. Tex., 1971):

> "... Employer has ... entered into various labor contracts with approximately 70 local labor unions representing groups

This Court's opinion says the over-the-road drivers, servicemen, and city operators (truckers, hostlers and city drivers) were all "represented by the petitioner" International Brotherhood of Teamsters, 431 U.S. 324, 329, n.3. By elimination, the IAM must have represented the truck mechanics at some terminals. Despite the fact that the IAM had contracts covering truck mechanics at some TIME-DC terminals, the Court's opinion is explicit that the seniority system with whose bona fides it was concerned was the *Teamsters'* nationally bargained[3] system:

> "The petitioner, International Brotherhood of Teamsters (union) was joined as a defendant. . . .

---

of employees at different terminals and other facilities throughout the United States. . . .

"It has been further pointed out that Local 745 is a local of the International Teamsters Union while some of the contracts are with locals of the International Machinists Union. . . ."

United States v. *TIME-DC, Inc.*, 6 FEP Cases 690 (N.D. Tex., 1972):

". . . The International Association of Machinists and Aerospace Workers, AFL-CIO was joined as a defendant . . . on April 21, 1971."

United States v. *TIME-DC, Inc.*, 517 F.2d 299, 303 (5th Cir., 1975):

". . . The International Association of Machinists and Aerospace Workers was subsequently joined as a defendant. . . ."

". . . TIME-DC has signed a total of 124 separate collective bargaining agreements with 83 individual Teamster locals at its various terminals. Each contract consists of three basic parts, the National Master Freight Agreement, an Area Supplement and Local Riders or Addenda. . . ."

[3] In footnote 59 (431 U.S. at 372) there is a detailed discussion of seniority rules contained in the Teamsters' National Master Freight Agreement and Southern Conference Area Over-The-Road Supplemental Agreement. There is no mention of any IAM agreement, seniority rules, or jobs covered thereby. The Court referred to "The city drivers and servicemen who are discouraged from transferring to line driver jobs. . . ." 431 U.S. at 356. It does not mention mechanics.

"The District Court and the Court of Appeals also found that *the seniority system contained in the collective bargaining agreements between the company and the union* operated to violate Title VII. . . .

"Accordingly, this . . . was held to constitute a continuing violation of Title VII, for which both the *employer and the union who jointly created and maintain the seniority system were liable.* . . .

"Because *the seniority system* was protected by § 703(h), *the union's* conduct agreeing to and maintaining the system did not violate Title VII." (431 U.S. at 329, 343, 344-45, 356; emphasis added.)

The Court discussed the TIME-DC-Teamsters system and its freedom from illegal purpose. It did not take judicial notice of the pre-1948 ritual, allegedly racist, of the IAM; it did not take judicial notice that craft unions used to discriminate against blacks; it did not discuss the motives of the IAM in seeking separate craft units or those of the NLRB in certifying them. It did not do any of the things respondents seek to have it do herein. In short, this Court dealt with the Teamsters seniority system at TIME-DC as separate and distinct from the IAM's system or systems there, which is as it should be.[4] Pullman and the USW

---

[4] This is also implicit in *United Air Lines* v. *Evans*, 431 U.S. 553, where the seniority system was described as contained in "the collective bargaining agreement between United and the Air Line Stewardesses and Flight Stewards" (431 U.S. at 555, n.6) without any reference being made to United's pilots, flight engineers, ticket agents, baggage handlers, etc. It is implicit in decisions of most of the Courts for Appeal; for example, compare *Heard* v. *Mueller Co.*, 464 F.2d 190 (6th Cir., 1972) with *Taylor* v. *Mueller Co.*, —— F.2d ——, 26 FEP Cases 1695 (6th Cir., 1981). These cases involved the same plant in Chattanooga where there was a USW bargaining unit covering the foundry, assembly, and shipping departments; and an IAM bargaining unit covering the machine division, which was divided into machine shop, maintenance, tool room and service departments. Both units had a regime of departmental seniority. In *Heard* the USW rules were held to constitute a bona fide seniority

should not be charged with the actions or motives of the IAM here any more than this was done in *Teamsters.*[5]

---

system; and in *Taylor* the IAM rules were held to constitute a separate bona fide seniority system. Neither case refers to the other system or considers the motivation of one union as having any bearing on the other's system, even though it was found that "Prior to 1963 [the IAM] prohibited blacks from becoming union members." 26 FEP Cases at 1697. Thus each system was held to be coextensive with the collective bargaining which created it. See also *Carroll* v. *United Steelworkers of America,* 498 F.Supp. 976 (D. Md. 376, 985-86) ("Since . . . the basic framework of the seniority system at the Sparrows Point plant has been developed on an industry-wide basis, the examination of the motivation . . . of the industry wide seniority system must be on an industry wide basis.") This case suggests that the scope of USW-Pullman seniority system should be viewed as coextensive with the USW bargaining units at all three plants at Bessemer, Butler and Hammond, which is also suggested by *Teamsters* and inconsistent with the Fifth Circuit's approach.

[5] We do not wish to be understood as conceding any impropriety was shown as to the IAM. All the evidence of record showed none. It was only long after both cases rested after three trials and some 20 trial days that respondents sought, unsuccessfully, to have the District Court take judicial notice of a pre-1948 "ritual" of the IAM, evidently an initiation ceremony, in which the proselyte allegedly undertook to nominate for membership only qualified white machinists. In *Taylor* v. *Mueller Co.,* —— F.2d ——, FEP Cases (6th Cir., 1981), a comparable restriction on union membership until 1963 was held not to vitiate a departmental seniority system. It is true respondents claim the creation and modification of the IAM bargaining unit in 1941-44 is circumstantial evidence of racial gerrymandering, but that argument runs smack into the Congressional policy (29 USCA § 9(b), that the NLRB might certify craft units. For if it be true as respondents argue that craft unions such as the IAM (Brief, p. 21, n. 24) were racially discriminatory and that this is a notorious fact which may be judicially noticed, and that this condemns all the seniority rules in a plant, where part of it is in a craft unit, the result would be to outlaw all craft bargaining units, and along with them the

The fallacy in the question-begging assumption by the Fifth Circuit and respondents that a "seniority system" under § 703(h) must be coextensive with the plant,[6] is underlined by the undisputed fact that in this record (Pullman's answers to Interrogatories, No. 92, filed January 9, 1973) that since 1956 there was a *third* bargaining unit at Pullman's Bessemer plant, also represented by the USW, consisting of office workers. Why then stop with the IAM? If the respondents can combine the USW production and maintenance unit seniority rules with those of the IAM unit, and call them one seniority system, why not include the USW office workers' unit seniority rules, too?

The answer is simply, as this Court has often pointed out, that this country's national labor policy is firmly rooted in collective bargaining as it is in eliminating racial discrimination, and the institutional framework for barganing as regulated for decades by the NLRB cannot simply be ignored by the Courts any more than Pullman and the USW could have ignored it in the 40's, 50's and 60's. In negotiating their seniority systems, they obeyed the law, in bargaining for the unit the NLRB certified, and they had no real choice in the matter. The objection may well be posed, but if the existence of a separate craft unit is not part of a seniority system, what is it? Even if some improper racial motive entered into its certification what is the current significance of the separate certification? Pullman submits that it is the same as any other ancient

---

seniority rules of all other unions in the same plants. This was not done in *Teamsters* and there is no more reason for it here. For although much is sought to be made of two post-certification revisions of the IAM unit, the logic, if any, of respondents' argument would apply to all craft bargaining units even if not revised.

[6] This assumption may be attributable to that court's tenacious failure to recognize that "there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems." *Teamsters*, 431 U.S. at 355, n. 41.

historical event which though it may affect seniority, is not a seniority rule. It was said in *United Air Lines* v. *Evans*, 431 U.S. 553, 558 (1977):

> "Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was *entitled to treat that past act as lawful.* . . . A discriminatory act which is note made the basis for a timely charge is the *legal equivalent of a discriminatory act which occurred before the statute was passed.* It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is *merely an unfortunate event in history which has no present legal consequence.*" (Emphasis added.)

The Court's remarks about "genesis" of seniority systems in *Teamsters* mark the exceptional case in which pre-Act historical events may have present legal consequences. If there were any real evidence that Pullman and the USW actually riggd their seniority rules for the purpose of disadvantaging blacks, it might certainly have present legal consequences, for *bona fides* under § 703(h) apparently has no statute of limitations. Once outside the scope of § 703(h), however, and separate bargaining unit certification is not part of the Pullman-USW seniority system, any more than Mrs. Evans' layoff was, ancient historical events alleged to be discriminatory do not themselves violate the law. In large measure we must take the world as we found it in 1965, the good with the bad, and put a stop to discriminatory acts thereafter. As stated in the legislative history of Title VII quoted in *Teamsters*, 431 U.S. at 350, 110 Cong. Rec. 7213 (1964):

> "*. . . if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis.*" (Emphasis the Court's.)

The fact of separate certification of the IAM bargaining unit is fortuitous in the same sense that having built two

separate plants corresponding to those units would be, or having long before 1965 contracted out all of the machine shop and millwright work to a separate employer would be; a historical fact which may be unfortunate, but imposing no Title VII obligations beyond that of filling vacancies as they occur on a non-discriminatory basis.[7] As there were relatively few black craftsmen prior to 1965, for whatever reason, it was the inevitable result of Congress' policy of authorizing craft units that many disproportionately white craft units would be certified.

The courts can, of course, remedy any post-Act events of discrimination by ordering hiring or transfers into the IAM unit with retroactive seniority, to a date not earlier than the effective date of the Act, and back pay, *Teamsters*, 431 U.S. at 357, just as they can among seniority units encompassed in a bona fide seniority system "without attacking the legality of the seniority system as applied to them." 431 U.S. at 347.[8]

---

[7] Consider this hypothetical case: An employer with a manufacturing plant in a central city decided pre-Act to build a new plant in a middle class white suburb to house a machine shop department and some other craft functions because of greater availability of labor already having the necessary skills. Assume the USW organizes the old plant and the IAM the new plant thereafter, still pre-Act, and negotiate separate seniority rules. Despite a continuing impact on blacks after 1965, we submit that no one would contend there are not two seniority systems, or that the continued operation of the second plant would violate Title VII. We submit the separate existence here of two separately bargained for units resulting in separate sets of seniority rules is no different in principle. Even if the pre-Act move were based on explicitly racial considerations in this hypothetical situation, it would have to be dealt with as an unfortunate historical event having no present legal consequences. For a plant location decision is certainly not within the "commonly accepted notions [of] a seniority system." *California Brewers* v. *Bryant*, 444 U.S. 598 at 605, 608.

[8] It may be also that the courts and the NLRB may devise other remedies involving separate bargaining units, but these do not in-

Once the allegations of pre-1948 IAM racism are eliminated from the picture, it is perfectly clear that *Teamsters* requires that the bona fides of the Pullman-USW seniority system be sustained. Pre-Act and post-Act discrimination was certainly present in *Teamsters*.[9] There were more than 40 cases of individual post-Act discrimination in *Teamsters*. The evidence in this case failed to show a single instance of post-Act discrimination against an individual black. Instead, it showed Pullman after 1965 was deliberately placing whites in formerly predominantly black departments and vice versa (Pet. App. 130a). At all times Pullman's work force at Bessemer was approximately 50% black although the relevant labor market was only about one-third black. Pullman employed blacks at a statistically significantly higher rate than random hiring would have produced. In all respects the material facts in this case were more favorable to *bona fides* than was the case in *Teamsters*.[10]

---

clude striking down the bona fides of a seniority system negotiated between an employer and one union, because of alleged ancient discriminatory conduct by another union.

[9] "The District Court and the Court of Appeals, on the basis of substantial evidence, held that the Government had proved a prima facie case of systematic and purposeful discrimination, continuing well beyond the effective date of Title VII. . . .

"Where, because of the employer's prior intentional discrimination the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them . . ." 341 U.S. at 342, 349-350.

[10] There is much objective basis for the District Court's finding that the seniority system was not adopted for disciminatory purposes which remains unanswered because it is unanswerable. For example, if the departmental seniority system was adopted at Bessemer to discriminate against blacks, how is it that the same system was adopted by the same parties at Butler, with fewer than 1% black employees? Why is there an occupational or job classification seniority system, more restrictive than departmental seniority on emloyee transfers and mobility, in the IAM unit since 1947 when for much of that time it was all white? If rigged for

II. Any Inference About Motivation From The Division Of Certain Departments Occasioned By The IAM Certification And Modification Thereof For Practical Purposes Is Dissipated By Later Seniority Unit Mergers.

Respondents argue (Brief, 27-32) that the December, 1941 modification of the USW and IAM certifications (JA 170), by moving the blacks in the Wheel and Axle Department (3 wheel roller laborers, 3 wheel rollers, and 3 wheel roller helpers) (JA 247) into the USW unit, split that Department along racial lines, and moving the 2 tool room men, both whites, into the IAM unit, manifests some sinister racial motivation of "the" seniority system. Even under respondents' improper analysis of the seniority system, such a conclusion is unfounded. In the subsequent June, 1944 modification of the certifications (JA 174-175) these changes were *reversed* so that Wheel & Axle became 39% black (Pet. App. 77a) and the tool room men went back into the racially mixed Steel Erection Department; some others went back into the racially mixed Maintenance Department. Both of these modifications can hardly be part of a sinister plan.[11] If there had been a sinister plan surely it would have occurred to the decision makers at some

---

the purpose of discriminating against blacks, why is it that the two largest departments, welding and steel erection, containing over half the work force, have always had large numbers of both races? And the next four largest departments also? (Pet. App. 69a). Why did the USW and Pullman return to departmental seniority from occupational seniority in 1954, resulting in increased employee mobility? The truth is, as the District Court found, the departmental seniority system had nothing to do with any discrimination practiced at Pullman but was inconsistent with whatever may have existed and was the instrument for its rapid elimination in May 1965. (Pet. App. 43a, 134a-135a.)

[11] Not even plaintiffs have contended that the IAM bargaining unit as defined from 1944 on would have been improper if originally certified. Since 1944 it has consisted only of craft employees in the machine shop and millwrights.

point to put the wheel rollers, wheel roller helpers and wheel roller laborers into the functionally related Truck Department (JA 130), but instead the seniority grouping of Wheel & Axle was in effect reintegrated in 1944. Likewise, the return to departmental seniority from occupational seniority in 1951 effected a reintegration of most seniority groupings. The merger of the Paint and Shipping Track Departments in 1954 resulted in increased mobility. The net result is that the deparmental changes do not appear to have been determined by racial considerations, for they went both ways, both toward and away from racial mixing.

III. Appendix A To Respondents' Brief Contains Nothing Detracting From The Bona Fides Of The Pullman-USW Seniority System.

By their Appendix A to their Brief respondents purport to identify errors in the chart appearing at JA 336. The chart is a reduction in size of a much larger chart received in evidence during the 1978 trial. While any one-page summary necessarily involves simplification, the chart fairly and accurately displays the evolution of Pullman's seniority systems.[12]

Plaintiffs state (App. A, 2a) that the chart should reflect two Wheel and Axle Departments between 1942 and 1947. Though unconvinced that the chart is in error (see CDX5), certainly there were two seniority units in the Wheel and Axle Department between 1942 and 1947, one represented

---

[12] Plaintiffs correctly point out (App. A, 4a) that the IBEW was decertified in 1946, and that JA 336 shows the date at the top of the fourth column as 1944. However, the original exhibit (CDX 27) contains the correct date, and this error exists only in the chart recreated at JA 336. Unfortunately, although the chart at JA 336 was reviewed prior to printing by all parties who agreed that JA 336 was an accurate recreation of CDX 27, apparently no one noticed the error in JA 336 and JA 336 is due to be corrected to conform to the original exhibit.

by the IAM and one by the USW. We have no objection to a "correction" of the chart to reflect this division of the Wheel and Axle Department since it would then more clearly display the nondiscriminatory intent of the Company and USW by emphasizing that in 1947 when the IAM lost its representation of some Wheel and Axle employees, the Company and USW immediately agreed on one seniority unit covering everyone in the department, black and white.

Contrary to plaintiff's assertion (3a-4a), the record fully supports the existence of the Railroad, Tool Room, Miscellaneous Stores, Truck & Tractor, Steel Stores, and Crane Service Departments between 1942 and 1947. The existence of those departments during this time period is therefore accurately reflected on the chart. The record support appearing at CDX 5 (1978 trial) includes departmental listings on 1941-46 overtime bonus lists, a 1945 list of employees absent on 8/24/45, and a 1946 checkoff list with an attached memorandum. There is no contrary evidence. The district court's finding noted by plaintiffs at JA 34a "although Wheel and Axle and Truck were listed as a single department for cost accounting purposes, for purposes of seniority they are two departments" is fully supported by the overtime bonus lists as well as the other documents in CDX 5.

Plaintiffs' statement at 4a that "the chart mistakenly shows [the Tool Room jobs] being ceded to the Steelworkers from the Electrical Workers' unit in 1944" is in error. The chart shows no such thing. The chart shows the Tool Room being established as a seniority unit in the Steelworkers bargaining unit in 1942, and continuing in that status until 1947 when it was merged into Steel Erection.

Contrary to plaintiff's statement at 5a that "[t]here is no record support for chart delineation of the Air Brake Pipe Shop as a separate departmental seniority unit in the years 1944 to 1946," all three of the separate type documents contained in DX5 specifically show the separate

existence of this department during this time period. Plaintiff's assertion at the bottom of 5a that the Air Brake and Pipe Shop was created by joining two departments, Shipping Track and Steel Erection, is similarly unsupported by the record. Every individual shown on the 1954 seniority list in the re-established Air Brake and Pipe Shop Department, can be traced to 1953 employment in the Steel Erection Department. Compare PX8, PX9, and CDX4. Plaintiff's contention that the Steel Miscellaneous Department "first appeared on a February 1953 seniority list" is similarly in error. The district court's conclusion at Pet. App. 43 that "the Steel Miscellaneous Department owes its separate existence—since 1952—to no apparent reason other than the fact that, prior thereto, there were two work gangs in the Steel Stores Department" is founded on PX 93 and PX 94 (JA 228-229) which specifically identify the date of the forming of this separate department as September 12, 1952. Since the dates used on the chart correspond in general to the dates of collective bargaining agreements, the portrayal of this event as occurring on June 1, 1952, is approximately correct, is more appropriate than any other date shown on the chart, and is misleading to no one.

IV. Appendix B To Petitioners' Brief Is Replete With Statistical Misinformation And Erroneous Method. In Addition The Statistics Discussed Are All Pre-Act And What Respondents Seek To Prove By Them Is Beside The Point Of Bona Fides.

APPENDIX B, Tables 1 and 2

The figures in the three columns headed "No. Workers," "No. Whites," and "No. Blacks" are grossly mistaken insofar as they purport to state the composition of the work force at any point in time. The source of the numbers is not given, but they are ridiculously wrong on slight inspection. The total work force in Table 1 (1964) is said to be 3875, of whom 2550 or 64% were white. The chart at JA 90, shows that employment was never higher than 3000

(Pet. App. 68a, 118a) and in 1964 never exceeded 2500. The chart at Pet. App. 77a and 128a shows a total work force in June, 1965, of 2324 which was 50.5% white. The work force has always been very close to half black (Pet. App. 34a, 120a), never less than 45% (Pet. App. 4a). Table 1 of Appendix B further represents that there were 1853 employees in the Welding Department in 1964 whereas the evidence shows there were never more than a total of about 875 in that department (Pet. App. 77a; P.Ex. 1-10, 1974 Trial). How did such egregious numbers get into Table 1? We confess we are not sure. It is claimed at App. B, p. 7, that the numbers in Table 1 (1964) were taken from P.Ex. 2 (1974 Trial), the seniority list originally typewritten as of June 1, 1964, and revised by handwritten entries to reflect new hires, terminations, transfers, and other changes continuously to July 9, 1965 when a new seniority list came into use. At first we suspected the obviously inflated numbers were derived by counting everyone who worked at all in that 13-plus month period in a department, as was done by respondent's satistical witness in preparing the exhibits for the 1974 trial.[13] However, an accurate count of the data

---

[13] 1974 Trial R., 722-725:

"Q. [By Mr. Stelzenmuller] . . . the source of the information in here partly comes from the seniority lists that were furnished to you?

"A. [By Ms. Mitchell] Right.

• • •

"Q. Could I inquire as to how you treated let's say when a name was lined out?

"A. When a name was lined out, I used that name anyway, and the job classification that was lined out.

"Q. . . . [I]n other words the data you have would not represent people working as of a fixed date but . . . all the names that appear on the seniority list?

"A. For that particular year,

"Q. And where a man's name is added in handwriting at the foot, I presume you likewise count that man?

"A. Yes, I did.

"Q. And if he . . . was added and lined out both, you add his name on there?

on P.Ex. 2 for the Welding Department made in that manner accounts for only a small part of the gross errors in counting. That exhibit shows the total number on the Welding Department seniority list on June 1, 1964 was 669 hourly employees, 562 white and 107 black (16.0%). During the year following, there were 350 added, 274 white and 76 black. After May 31, 1965, there were 135 added hourly employees, 118 white and 17 black. The total number of all hourly employees appearing anywhere on this Welding Department list is 1154, 954 white and 200 black (17.3%), but these were not all on the list at the same time.[14] On June 1, 1965, after deletions made as shown in the footnote, there were between 631 and 618 whites, and between 141 and 123 blacks (between 16.3% and 18.6%).[15] On July 2, 1965, the count was 719 white and 137 black (16.0%). Table 1 shows 1655 whites and 198 blacks, which are grossly in error no

---

"A. Right.

• • •

"Q. . . . [E]very man's name appears in the department . . . in any form, it would appear on the list in your document, that is, in the count?

"A. Right, every name.

[14] The seniority list shows as deletions those who left the department for various reasons during the 14-month period as follows:

	6/1/64–5/31/65		5/31/65–7/9/65		No date given	
	white	black	white	black	white	black
Quit or failed to report	154	19	16	2	0	0
Discharged	15	3	1	1	0	0
Transferred to other depart.	12	17	0	0	9	15
Deceased	2	0	0	0	0	0
Retired	3	0	0	0	0	0
Other	19	3	0	0	4	3
	205	42	17	3	13	18

[15] The district court counted 678 whites and 161 blacks (19.2%) on this source document (JA 77a, 128a). Possibly a few dozen entries can have two interpretations, but certainly that cannot explain the gross discrepancies in Table 1.

matter who is counted. The District Court (Pet. App. 129a, n.28, 131a, n.29) pointed out that quit rates and personal preference are matters which can lead to non-random makeup of departments. Tables 1 and 2 are thus without much probative value of anything.[16]

What is perhaps the oddest thing about Tables 1 and 2 is their basic irrelevance. No one contends employees were assigned to departments at random prior to 1965. Pullman contended it did not fail to assign any qualified black to any job requiring welding or craft skills, to the point at least of de minimis. The District Court found, and we cannot say it was clearly erroneous, that (Pet. App. 27a, 41a, 51a, 131a):

> "For a number of years—until the arbitration decision in March 1965—there was an informal custom at the plant of keeping certain jobs as 'white only' and others as 'black only.' This practice in turn . . . caused decisions respecting assignments to departments throughout the plant to be infected with racial considerations. . . .
>
> "The seniority system under attack had its genesis—whether viewed as being in 1941-42 or in 1956—at a period when racial segregation was certainly being practiced; but this system was not itself the product of the bias. The system rather came about as a result

---

[16] As a matter of statistical method, there is also a basic error in calculating *all* of the figures in the "Chance Probability" columns in Tables 1 and 2. Respondents' calculations of probability are all made in the way appropriate to a "one-tail test" whereas the correct method is for a "two-tail test" which raises the probability by a factor of about 100%. In other words, the one-tail test would be appropriate if the only possibility would be a disproportionately high ratio of blacks in a given department, but if one considers the possibility of a disproportionately high ratio of blacks or whites (two-tailed test), the chances of this happening at random are approximately doubled. (P. Hoel, *Elementary Statistics* (4th Ed.) 180-184). In addition there are quite a few errors in calculating standard deviations and probability in Tables 1 and 2, but they seem so lacking in evidentiary value that we won't enumerate them.

> of colorblind objectives of a union. . . . Nor did it foster the discrimination—of keeping certain jobs as being for one race or the other—which was being practiced by custom in the plant. Indeed, it was this very seniority system which, as a result of arbitration in 1965, provided the means for stopping that discrimination even before the effective date of Title VII. . . .
>
> "Discrimination against blacks . . . was accomplished through the vehicle of reserving many of the 'better' jobs for whites. The departmental seniority system was not adopted with the intent or purpose of protecting whites against blacks. . . .
>
> "Actually . . . a demonstration of segregation in job classifications . . . would have no causal connection with the departmental seniority system, but would be indicative of some other discriminatory practice."

In n.3, Pet. App. 27a, the District Court found:

> "It is not without significance . . . that it was the seniority system itself which in early 1965 provided the means for overturning the practice of job segregation."

Since nobody claims there was a random process, there would be no reason to expect the statistics to reflect a random distribution. The point is, not whether employees were randomly distributed by race (emphatically not true in *Teamsters*, yet held not to defeat *bona fides*) but whether the seniority system was rigged for the purpose of discriminating against blacks.[17] The District Court found there was discrimination and non-random distribution, but that the seniority system was not negotiated for that purpose, just as in *Teamsters*. The fact that the races were not represented randomly in many departments is not sur-

---

[17] *Teamsters*, 431 U.S. at 339, n.20:

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practice will result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

prising; what is more significant here is that the vast majority of employees of both races were actually in racially mixed departments; for this indicates positively that such discrimination as may have occurred was of a different nature from segregating the races in different seniority units, just as the District Court found.

In any event, the same statistical phenomena *sought* to be shown by Appendix B were clearly *present* in *Teamsters*, where line drivers were all white (with one isolated exception), yet the seniority system's bona fides was upheld. On the same basis, the most Appendix B could show, if its data and methodology were accurate, is that there was pre-Act discrimination. As clearly held in *Teamsters*, the § 703(h) exception clearly *presupposes* pre-Act discrimination. The bottom line is that charts about the work force in 1956 and 1965, even if accurate, which these are not, cannot mean any more than they did in *Teamsters*.[18]

There are other statistical curiosities in respondents' brief. In general their statistical arguments are of little probative value.[19]

---

[18] See charts in *United States* v. *TIME-DC*, 517 F.2d 299 at 312, n.24 and 313, n.25 and 26.

[19] Rather than to reply to every one in detail we believe it is more appropriate to deal with typical examples. Page 55 of respondents' brief asserts the following facts about employees in 1973 in the USW bargaining unit with over six years' seniority:

> "... 551 or 74% of all black employees as compared to 119 or 16% of all white employees earned less than $4.25 an hour, job class 8 or below. JA 65. Moreover, 634 or 81% of all white employees as compared to 192 or 20% of all black employees earned more than $4.40 an hour, job class 10 or above. *Id.* The average hourly basic rate for black employees ... was $4.14 as compared to $4.45 for white employees."

These figures are contradictory. If 74% of all blacks equals 551, then the total number of blacks is 551/.74, or 745. But if 20% of all blacks equals 192, then the total number of blacks equals 192/.20 or 960. Obviously one is in error. Likewise, the figures assert the total number of whites is both 119/.16 or 774 and 634/.81 or 783. Turning to JA 65 which is cited in support of

V. The District Court's Findings Of Pullman's Compliance With Title VII Were Supported By A Full And Complete Record.

The suggestion by respondents' brief (p. 146) that this is a "paper case" is unbecoming. We tried this case for twenty trial days, introducing thousands of pages of live testimony, many depositions, and thousands of documents. The district court lived with the case for years and recognized from the extensive oral evidence the utter vacuousness of the individual claims (Pet. App. 151a-153a, 115a-116a), the surprising sparseness of race-related grievances among the 2,800 grievances filed in 8 years, "together with the near-paranoiac, exaggerated descriptions by those who did have such complaints," (Pet. App 140a, n. 38) the adoption of affirmative action programs in 1969-72 which in significant respects went beyond Pullman's legal obligations (Pet. App. 122a-124a), the rapid progress of blacks after 1965 toward economic equality (Pet. App. 134a), the use of biracial compliance officers to follow through on compliance with the affirmative action program, the highly successful vocational training programs undertaken (Pet. App. 122a), and the rapidity with which the departmental seniority system enabled blacks to move to the highest paid

---

these figures, the totals are given there as 753 blacks and 743 whites, which doesn't agree at all with any calculation. More importantly, as found by the district court, Job Class number is at best a rough index of earnings potentials (Pet. App. 127a). For many reasons it is less accurate than average total earnings; it represents only the highest pay class in which the employee has qualified to work (Pet. App. 120a, 133a). Many whites with high JC numbers obtained prior to April, 1965 actually regularly worked in lower paying jobs because blacks with departmental seniority had superseded them after post April 1965 layoffs and recalls (Pet. App. 133a). The JC number does not reflect piecework incentive pay, which is substantial in some jobs, non-existent in others (Pet. App. 119a). It does not reflect overtime pay, which varies in different jobs. Certainly a better measure is average total annual pay for which by 1973 blacks had attained 96.8% of whites (Pet. App. 134a).

jobs in their departments (Pet. App. 43a-56a, 134a-135a), facts in the light of which the documentary history of the seniority system introduced in the last trial could be weighed and evaluated. Certainly the district court was justified in finding (Pet. App. 43a) that "This is not a situation . . . where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices." On the first appeal the Fifth Circuit commented on "the very substantial, good faith efforts of the employer and union working together to end racially segregated working practices" (Pet. App. 67a). The last panel of the Fifth Circuit saw a paper case, true. The district court saw the flesh and blood evidence of scores of witnesses, and the story which emerged from their testimony was of a company with a past perhaps not totally unsullied by the mores of bygone times, but from early 1965 on, with a dynamic and exemplary record of sound progress in race relations, a model for other employers, without a single case being shown of discrimination against any black individual.

CONCLUSION

The Company urges again the conclusion of its main brief.

Respectfully submitted,

SAMUEL H. BURR
Counsel of Record
C. V. STELZENMULLER
D. FRANK DAVIS
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203
(205) 251-3000
F. B. SNYDER
200 South Michigan Avenue
Chicago, Illinois 60604
Attorneys for Petitioner
Pullman-Standard

Of Counsel:
THOMAS, TALIAFERRO, FORMAN, BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1190 and 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO

LAURENCE GOLD
AFL-CIO
815 - 16th Street, N.W.
Washington, D.C. 20006

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

[Additional Counsel listed on inside cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. THE STANDARD OF REVIEW	1
II. RESPONDENTS' ATTEMPT TO SECURE YET A THIRD INDEPENDENT FACT FINDING AS TO THE MOTIVATION OF THE SENIORITY SYSTEM	6
III. THE GOVERNMENT'S POSITION	10
IV. THE "JAMES" FACTORS	15
CONCLUSION	20
APPENDIX: DEFECTS IN RESPONDENTS' STATISTICAL ANALYSIS TENDERED IN APPENDIX B TO THEIR BRIEF	1a

TABLE OF AUTHORITIES

Cases: Page

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 18

Board of Ed. of City of Bessemer v. United States, reported sub nom. United States v. Jefferson County Bd. of Ed., 372 F.2d 836 (5th Cir. 1966), aff'd per curiam on petition for rehearing en banc, 380 F.2d 385 (5th Cir. 1967), motion for stay of execution denied, 386 U.S. 1001 10

Brown v. Board of Ed. of City of Bessemer, 419 F.2d 1211 (5th Cir. 1970), rev'd in part, 396 U.S. 290; 429 F.2d 576 (5th Cir. 1970); 432 F.2d 21 (5th Cir. 1970); 446 F.2d 75 (5th Cir. 1971); 464 F.2d 382 (5th Cir. 1972) 10

Brown v. Sibley, 650 F.2d 760 (CA 5 [Unit A] 1981) 1

C. W. Smith v. Farah Mfg. Co., Inc., 650 F.2d 64 (CA 5 [Unit A] 1981) 1

California Brewers Association v. Bryant, 444 U.S. 598 19

Castaneda v. Pickard, 648 F.2d 989 (CA 5 [Unit A] 1981) 1

Chicano Police Officer's Ass'n v. Stover, 552 F.2d 918 (7th Cir. 1977) 4

Commissioner v. Duberstein, 363 U.S. 278 (1960).. 6

Cousin v. Board of Trustees, Etc., 648 F.2d 293 (CA 5 [Unit A] 1981) 1

DeMarco v. United States, 415 U.S. 449 4

Ferran v. Flemming, 293 F.2d 568 (5th Cir. 1961).. 5

General Electric Credit Corp. v. Robbins, 414 F.2d 208 (CA 8 1969) 4

Graver Mfg. Co. v. Linde Co., 339 U.S. 605 (1950).. 6

Griggs v. Duke Power Co., 401 U.S. 424 10

Hycon Manufacturing Co. v. H. Koch & Sons, 219 F.2d 353 (9th Cir. 1955) 4

Jackson v. City of Killeen, 654 F.2d 1181 (CA 5 [Unit A] 1981) 1

James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 15-19

TABLE OF AUTHORITIES—Continued

	Page
Joshi v. Florida State University, 646 F.2d 981 (CA 5 [Unit B] 1981), petition for certiorari filed, 50 USLW 3467 (1981)	1
Kelley v. Southern Pacific Co., 419 U.S. 318	4-5
Lee v. Beto, 429 F.2d 524 (5th Cir. 1970)	4
Lindsey v. Mississippi Research & Development Center, 652 F.2d 488 (CA 5 [Unit A] 1981)	1
Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962)	4
Marable v. H. Walker & Associates, 644 F.2d 390 (CA 5 [Unit B] 1981)	1
Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (CA 5 [Unit A] 1981), petition for certiorari filed, 50 USLW 3176 (1981)	1
Robbins v. White-Wilson Medical Clinic, Inc., 642 F.2d 153 (CA 5 [Unit B] 1981), vacated on other grounds, 645 F.2d 252 (1981)	1
Rohde v. K. O. Steel Castings, Inc., 649 F.2d 317 (CA 5 [Unit A] 1981)	1
Rule v. Intern. Ass'n. of Bridge Workers, 568 F.2d 558 (8th Cir. 1977)	4
Smithfield v. Home Insurance Company of New York, 244 F.2d 337 (9th Cir. 1957)	4
Southland Corp. v. Campbell, 358 F.2d 333 (5th Cir. 1966)	4
Steelworkers v. Weber, 443 U.S. 193	10
Teamsters v. United States, 431 U.S. 324	5, 6, 7a
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63	15
United States v. Board of Ed. of City of Bessemer, 396 F.2d 44 (5th Cir. 1968)	10
United States v. General Motors, 384 U.S. 127	5
United States v. Gypsum Co., 333 U.S. 364 (1948)	6
United States v. Jefferson County Bd. of Ed., 417 F.2d 834 (5th Cir. 1969)	10
United States v. Parke Davis & Co., 362 U.S. 29	5
United States v. Pickett's Food Service, 360 F.2d 338 (5th Cir. 1966)	5

TABLE OF AUTHORITIES—Continued

Page

United States v. Singer Mfg. Co., 374 U.S. 174, (1963) 6
Wilkins v. University of Houston, 654 F.2d 388 (CA 5 [Unit A] 1981) 1
Williams v. United States, 252 F.2d 887 (5th Cir. 1958) 5
Wood Construction Co. v. Pool Construction Co., 314 F.2d 405 (10th Cir. 1963) 4
Yanish v. Barber, 232 F.2d 939 4

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e:
§ 703(h), 42 T.S.C. § 2000e-2(h) ..... *passim*

Rules:

Federal Rules of Civil Procedure:
Rule 52(a) ..... *passim*

Miscellaneous:

5A Moore's Federal Practice, ¶ 52.06[2], (2d Ed. 1981) 4
9 Wright and Miller, Federal Practice and Procedure, § 2587 6
U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 97, "Money Income in 1973 of Families and Persons in the United States," Table 56 (GPO, 1975) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 80-1190 and 80-1193

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO

I. THE STANDARD OF REVIEW

In the Fifth Circuit the settled rule in discrimination cases is that the appellate court is to make an "independent determination," "free of the clearly erroneous rule," of the question whether the defendant acted with a discriminatory purpose. See USW Br. 30, 31 n. 41.[1]

In their briefs, neither respondents nor the Government disputes that that is the Fifth Circuit's rule; and neither even attempts to justify that rule. Rather, respondents argue that the Fifth Circuit found the district court to have "misapplied the pertinent legal standard" and that the court of appeals properly acted for *that* reason to make its own evaluation of the facts. R. Br. 144-146.[2] Respondents understand the law to be that

---

[1] The Fifth Circuit has continued to apply that rule in numerous cases decided after the instant case and those listed at n. 41 of our opening brief. See, *e.g.*, *Robbins v. White-Wilson Medical Clinic, Inc.*, 642 F.2d 153, 154-155, n. 1 (CA 5 [Unit B] 1981), vacated on other grounds, 645 F.2d 252 (1981); *Marable v. H. Walker & Associates*, 644 F.2d 390, 395 (CA 5 [Unit B] 1981); *Joshi v. Florida State University*, 646 F.2d 981, 986 (CA 5 [Unit B] 1981), petition for certiorari filed, 50 USLW 3467 (1981); *Cousin v. Board of Trustees, Etc.*, 648 F.2d 293, 295-296, n. 3 (CA 5 [Unit A] 1981); *Castaneda v. Pickard*, 648 F.2d 989, 1001-1002 (CA 5 [Unit A] 1981); *Rohde v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 320, n. 1 (CA 5 [Unit A] 1981); *C. W. Smith v. Farah Mfg. Co., Inc.*, 650 F.2d 64, 68 (CA 5 [Unit A] 1981); *Brown v. Sibley*, 650 F.2d 760, 766 n. 8 (CA 5 [Unit A] 1981); *Wilkins v. University of Houston*, 654 F.2d 388, 390 (CA 5 [Unit A] 1981); *Lindsey v. Mississippi Research & Development Center*, 652 F.2d 488, 492 (CA 5 [Unit A] 1981); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1147 (CA 5 [Unit A] 1981), petition for certiorari filed, 50 USLW 3176 (1981); *Jackson v. City of Killeen*, 654 F.2d 1181, 1184-1185 (CA 5 [Unit A] 1981).

[2] The Government takes a different tack, suggesting that it is possible to read the opinion below as applying the "clearly erroneous" rule and not the rule of independent determination of the facts established by the Fifth Circuit for cases such as this. To be sure, the Government is able to point to that court's invocation of the words of the "clearly erroneous" test—"the definite and firm conviction that a mistake has been made" (App. 15a); but under

if the district court had an erroneous view of the law, then Rule 52(a) no longer applies, the court of appeals is free to substitute itself as the original fact-finder (R. Br. 144-146), and the court of appeals' substituted fact-findings must stand unless *that* court "applied an improper legal standard" (*id.* 146). Respondents' contention fails for three reasons.

1. The district court did not commit any "errors of law," and the court of appeals did not suggest that the district court had done so. While respondents contend that the district court committed six such "errors" (R. Br. 145, n. 102; see also *id.* 148-149), upon examination

---

the circumstances here that is not a sufficient basis for concluding that the court applied a scope of review other than that called for by the governing rule in the Fifth Circuit. Such a reading would mean that the court below did not follow the established rule of the Circuit as to the appropriate scope of review in precisely this type of case—a rule recognized, indeed quoted, in the opinion below. App. 15a, n. 6. And any ambiguity that might be raised by the words used by the court below is removed by examination of the method of review actually employed by that court in this case: the court made its own analysis of the facts and did not address the evidence supporting the district court's findings. See Union Br. 38-48. Moreover, where the Government lifts phrases from the court of appeals' opinion that might be consistent with a "clearly erroneous" standard, there are an equal number of such phrases pointing the other way. See, *e.g.*, App. 11a ("appear to be based"); *id.* 12a ("the evidence further indicates"); *ibid.* ("[t]he record evidence, generally, indicates"). Further, at the critical point in its analysis, when the court was stating its conclusions, it declared:

> The district court *might have* reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration . . .
>
> *We* consider significant in *our* decision [four enumerated factors]. Because *we find* that the differences in the terms, conditions and standards of employment for black workers and white workers resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) . . . [App. 16a (emphasis added)].

These statements are consistent only with the court's having conducted the "independent determination" it expressly stated was its responsibility.

it is clear that respondents' quarrel is with the *weight* accorded certain items of evidence by the district court in resolving the *factual* question whether the seniority system was motivated by race.[3]

2. With respect to one of these evidentiary matters—the IAM's motives—the district court expressly declined to make a finding, believing that as IAM had no role in negotiating USW's seniority system IAM's motives were not indicative of the motivation with which the system was negotiated. The court of appeals disagreed, and, without remanding, proceeded to decide on its own what the IAM's motives had been. Regardless whether the disagreement between the courts over the significance of the IAM's motives be regarded as a matter of weighing evidence (as we contend) or as a disagreement of "law" (as respondents contend)—and even if the court of appeals were right that resolution of this factual matter was important (but see USW Br. 47-48 and *infra* pp. 13-15)—the court of appeals had no business determining in the

---

[3] The district court's "fail[ure] to consider the motive of the Machinists" (R. Br. 145, n. 102) reflected its belief that the motive of the IAM was not indicative of the motivation with which USW's seniority system was negotiated, as the IAM had not participated in those negotiations. The district court did not "fail[] to consider the degree of segregation fostered by the seniority system or its harm upon blacks" (R. Br. 145, n. 102), the district court considered those factors and found that on the facts of this case they were not so substantial as to compel an inference of discriminatory motivation in the face of other, more convincing evidence of innocent motivation (see USW Br. 19-20, 20a-22a). The district court did not "fail[] . . . to consider the racial consequences of changes in the seniority system after the November 1941 NLRB certification" (R. Br. 145, n. 102), the district court considered those consequences but found that there were more persuasive indices of innocent motivation for the changes (App. 32a-37a). The other three "errors of law" attributed by respondents to the district court are, by respondents' own articulation of them, simply quarrels that the district court should have accorded more weight to particular facts than that court thought warranted: "failed . . . to give '*due* consideration' to . . ."; "failed to consider *adequately* . . ."; "failed . . . to examine *fully* . . ." (R. Br. 145, n. 102; emphasis added).

first instance what the IAM's motives had been. The rule when a district court fails to resolve a factual dispute that the court of appeals deems critical was stated in *DeMarco v. United States*, 415 U.S. 449, 450 n.:

> [F]act finding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court. See, *e.g.*, *General Electric Credit Corp. v. Robbins*, 414 F.2d 208, 211 (CA 8 1969); *Yanish v. Barber*, 232 F.2d 939, 946-947 (CA 9 1956). See also 5A J. Moore Federal Practice § 52.06[2] n. 1 (2d ed. 1974).[4]

That rule was applied in *Kelley v. Southern Pacific Co.*, 419 U.S. 318. In that case, the court of appeals had ruled that the district court had applied an erroneous legal principle, and this Court agreed. But the court of appeals had proceeded to "render . . . judgment for respondent," and this Court "part[ed] company with the Court of Appeals on the propriety of a remand" (*id.* at 331), explaining that as the outcome under the correct legal standard depended upon a question of fact that the district court had not expressly decided, the case should be remanded to the district court "for further findings" (*id.* at 332). The Court indicated that the remand would not have been necessary had the record permitted only one

---

[4] See also, *e.g.*, *Rule v. Intern. Ass'n. of Bridge Workers*, 568 F.2d 558, 568 (8th Cir. 1977); *Chicano Police Officer's Ass'n. v. Stover*, 552 F.2d 918, 921 (7th Cir. 1977); *Lee v. Beto*, 429 F.2d 524, 525 (5th Cir. 1970); *Southland Corp. v. Campbell*, 358 F.2d 333, 337-338 (5th Cir. 1966); *Wood Construction Co. v. Pool Construction Co.*, 314 F.2d 405, 406-407 (10th Cir. 1963); *Lundgren v. Freeman*, 307 F.2d 104, 114-115 (9th Cir. 1962); *Smithfield v. Home Insurance Company of New York*, 244 F.2d 337, 341 (9th Cir. 1957); *Hycon Manufacturing Co. v. H. Koch & Sons*, 219 F.2d 353, 355 (9th Cir. 1955). And see, generally, the innumerable cases cited in 5A Moore's Federal Practice, ¶ 52.06[2], n. 1 (2d Ed. 1981).

resolution of the factual issue, i.e. if "any [other] finding would have been clearly erroneous" (*id.* at 331).[5]

In the instant case, the record would permit a finding either way as to whether the 1941-42 transfer resulted from racial motivation on the part of IAM (USW Br. 46-47, 7a n. 3; see also Govt. Br. 24). Accordingly, the court below, upon determining this factual issue to be critical, overstepped its area of responsibility by resolving the issue itself without a remand.

3. The broader principle championed by respondents at R. Br. 144-146—that once a district court commits a single error of law the appellate court is free to redetermine *all* the facts in the case—would, if it were truly a rule of the Fifth Circuit,[6] be inconsistent with Rule 52(a) for the same reasons as is its rule that the appellate court is to independently determine questions of "ultimate fact" (USW Br. 33-38).[7]

---

[5] *United States v. Parke Davis & Co.*, 362 U.S. 29, 44 and *United States v. General Motors*, 384 U.S. 127, 142, relied upon by respondents at R. Br. 137, are applications of this exception. In each case, this Court reversed on questions of law and was able to decide the case finally because the pertinent facts were "undisputed".

[6] Th Fifth Circuit's decisions suggest that the doctrine cited by respondents—that findings made under an erroneous view of the law "may not stand"—has a different office entirely, i.e. to define the fact-finding role of the district court following the remand necessitated by its legal error. See, e.g., *Williams v. United States*, 252 F.2d 887, 888 (5th Cir. 1958); *Ferran v. Flemming*, 293 F.2d 568, 571 (5th Cir. 1961); *United States v. Pickett's Food Service*, 360 F.2d 338, 341 (5th Cir. 1966).

[7] At one point in their brief, respondents assert that "the record presents a 'paper case' " and, therefore, apparently, that the court of appeals had greater freedom to explore the facts than it would have in a case involving live testimony. (R. Br. 146-147)

To begin with, this is far from being a paper case. The seniority system was a primary focus of all three trials in this case, and not merely the last trial, as respondents suggest. To be sure, the district court, after this Court's decision in *Teamsters v. United States*, 431 U.S. 324, granted respondents' motion for a limited new trial for "presentation of *additional* evidence relevant to the issue of

II. RESPONDENTS' ATTEMPT TO SECURE YET A THIRD INDEPENDENT FACT-FINDING AS TO THE MOTIVATION OF THE SENIORITY SYSTEM.

Part I—constituting the bulk—of respondents' brief attempts to demonstrate that as a matter of fact the seniority system in this case was badly motivated. It is written as if it were a brief to a district court. But this Court most assuredly did not grant certiorari to become the *third* court to make an independent determination of

---

the validity of the seniority system under Section 703(h)" (App. 47a, emphasis added), and the one-day trial that ensued consisted largely of introduction of documentary evidence. But throughout the prior 18 days of trial the validity of the seniority system had been the principal issue in the case, and the parties had put before the district court voluminous testimony describing the origins and workings of the seniority system which underpinned the court's ultimate findings. The intimate familiarity with the seniority system that the district court had acquired by reason of the evidence introduced at the earlier trials is reflected in its decisions issued following the first and second trials (see, especially, App. 118a-145a, 49a-58a). Thus, while the dispositive issue had changed by reason of this Court's decision in *Teamsters*, the evidence introduced at the prior trials was relevant to, and relied upon by the district court, in resolving that issue. See, e.g., JA 36-41, 43-53, 56-64, 91-98.

Moreover, respondents in their brief repeatedly point to disputed in-court testimony, some of which the district court discredited, as support for their position that the seniority system was discriminatorily motivated. See, e.g., Resp. Br. 9, n. 7, 15, n. 19, 17-18, nn. 21, 22; compare *infra* at pp. 7-8, n. 8; JA 98.

But even if this were a "paper case", we are not certain what conclusion respondents believe would follow. Respondents acknowledge that the "clearly erroneous" rule applies to cases involving only documentary evidence. R. Br. 142, n. 101. That acknowledgment is required by "the clear language of rule, two notes of the Advisory Committee, and pointed expressions from the Supreme Court." 9 Wright and Miller, *Federal Practice and Procedure*, § 2587, p. 740 (1971). See *United States v. Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n. 9 (1963); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *Graver Mfg. Co. v. Linde Co.*, 339 U.S. 605, 609-610 (1950). See also the materials cited at USW Br. 33-34.

the facts in this case. Respondents therefore do not acknowledge that they are asking this Court to make an independent factual determination; this part of their brief is captioned "The Fifth Circuit Correctly Held That The Seniority System Was Intentionally Discriminatory" (R. Br. 64). But the Fifth Circuit's analysis of this case and its findings of fact go virtually unmentioned in the 72 pages that are subsumed under this caption. Instead, those pages contain an argument, based largely on "facts" nowhere mentioned by the Fifth Circuit, that on this record the weight of the evidence supports a finding that the seniority system was discriminatorily motivated. Implicit in respondents' method is the admission that the reasons given by the Fifth Circuit do not support its holding.

While resolution of factual issues is not the task of this Court, we feel compelled to state, lest respondents' assertions of fact be taken accurately to characterize this case, that respondents' recitation is replete with mischaracterizations of the record, and with inferences that are not warranted even from the record as thus erroneously portrayed. And, to assure that our claim in this regard is not taken as mere rhetoric, we focus on three of respondents' "factual" assertions to exemplify the extent of respondents' departure from the record and the findings below.

First, relying on two pages of testimony by a single witness (JA 97-98), respondents repeatedly assert as "fact" that prior to Title VII USW officials generally would not press "racial grievances," and that on one occasion in 1963 a USW official would not pursue a grievance challenging discriminatory application of the seniority system. (R. Br. 17 n. 22, 90, 108).[8] The

---

[8] Although the witness' general charge was addressed to the performance of "*black* union officials" (JA 97, emphasis added), respondents put the blame on "*white* union officials" (R. Br. 90, emphasis added). The need for that transferrence is understandable,

district court expressly *discredited* this testimony, finding that there had *not* been discriminatory application of the seniority system (App. 28a), and that prior to Title VII the union had taken to arbitration and won a grievance establishing the right of blacks to exercise seniority to promote to white jobs (App. 41a; see also USW Br. 15, n. 29). Indeed, the district court found that the union was "not . . . dominated by whites" (App. 40a), "was one of the few institutions in the area which did not function in fact to foster and maintain segregation" (*id.*), and pursued "colorblind objectives" (App. 41a). The court of appeals recited and did not disturb these findings (App. 13a), and the court of appeals did *not* cite or indicate that it credited the contrary testimony cited to this Court by respondents. As the Government correctly states, "[t]he district court found . . . that the USW did not have a history of racial discrimination; the court of appeals did not appear to disagree with the district court's assessment of the USW's history . . ." (Govt. Br. 23). Respondents thus urge affirmance on the basis of a supposed "fact" that was discredited by both lower courts and that was not relied upon by the court of appeals in making the "finding" that respondents urge be affirmed.

Second, respondents in their brief place heavy reliance upon an alleged racial "disproportionality" in the departments—a phenomenon that they contend warrants an inference that the parties designed the seniority system with a purpose to discriminate against blacks (R. Br. 49-54, 113-118). That showing of "disproportionality" is based *entirely* on a statistical demonstration that respondents have constructed for the first time in this Court, one that perforce could not have been (and was not) a basis for the decision below. (Although not so acknowledged by

---

for as respondents themselves acknowledge (R. Br. 19-20 and n. 23), and the record irrefutably shows (JA 209, 213, 216-220, 238), the witness' testimony is not credible: black union officials were from the start militant in pressing complaints of racial injustice.

respondents in their brief, the statistical demonstration that appears in Appendix B thereto was never introduced by them into evidence, nor was it even tendered to the court of appeals.) This would not be the place to tender new statistical analyses even if they were reliable. But respondents' analysis is hopelessly flawed: the numbers that appear in the tables deviate substantially from those in the sources from which they are purportedly drawn, the data relate to periods long after the seniority system was constructed and thus cannot bear on the motivation of those who constructed the system, the statistical methodology is fundamentally flawed, and, in any event, even if none of the above flaws were present, the results of the analysis would not be probative that the seniority system was negotiated with discriminatory purpose. We explain all this in a short appendix to this reply brief.

Third, respondents cite average wage figures for blacks and whites in USW's bargaining unit in 1973 ($4.14 for blacks, $4.45 for whites)—based, apparently, on complex arithmetic computations respondents have performed for the first time in this Court—to show that blacks were so disadvantageously located that an inference is compelled that the seniority system was designed for the purpose of "locking" black employees into inferior jobs (R. Br. 117). No such figures were presented to the court of appeals, nor did the court of appeals purport to rely on such "evidence" in finding discriminatory purpose. But even on respondents' figures, average black wages in USW's bargaining unit were 93% of average white wages, at a time when the average income of fully-employed black males in the South was only 58% that of fully-employed white males.[9] Given the inferior educa-

[9] U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 97, "Money Income in 1973 of Families and Persons in the United States," Table 56 (pp. 117-118) (GPO, 1975): mean figures for "Negro males, year-round full-time workers" in the South [$7,170] and for "white males, year-round full-time workers" in the South [$12,396]. The statistics for males are used be-

tions in segregated schools to which many of the black employees had been subjected (cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430),[10] the inability of blacks in the South to obtain training in the skilled trades (see *Steelworkers v. Weber*, 443 U.S. 193, 198) and the consequent inability of many of the black employees to qualify for the most highly-skilled and highly-paid jobs in USW's unit (App. 55a, n. 13), it is inevitable that no matter *what* seniority system were chosen there would remain *some* disparity between black and white earnings. The disparity respondents proffer is so small that, assuming its accuracy, it suggests that the seniority system here is *not* the cause of any economic disadvantage suffered by blacks, and thus tends to *refute* the inference that the parties could have designed the senority system *for the purpose of* visting such disadvantage.

III. THE GOVERNMENT'S POSITION

The Government takes a position markedly at odds with that of respondents. The Government recognizes that the court of appeals erred in overturning the district court's finding that USW's seniority system was not the product of discriminatory purpose, and accordingly erred in invalidating so much of USW's system as was untainted by the allegedly discriminatory motivation of the

---

cause virtually all the employees in USW's bargaining unit were males (App. 70a). The comparable percentage *nationwide*, according to the same table, is 65%, $8,458 for blacks, $12,998 for whites.

[10] See *Board of Ed. of City of Bessemer v. United States*, reported *sub nom. United States v. Jefferson County Bd. of Ed.*, 372 F.2d 836 (5th Cir. 1966), *aff'd per curiam on petition for rehearing en banc*, 380 F.2d 385 (5th Cir. 1967), *motion for stay of execution denied*, 386 U.S. 1001; *United States v. Board of Ed. of City of Bessemer*, 396 F.2d 44 (5th Cir. 1968); *United States v. Jefferson County Bd. of Ed.*, 417 F.2d 834 (5th Cir. 1969); *Brown v. Board of Ed. of City of Bessemer*, 419 F.2d 1211 (5th Cir. 1970), *rev'd in part*, 396 U.S. 290; 429 F.2d 576 (5th Cir. 1970); 432 F.2d 21 (5th Cir. 1970); 446 F.2d 75 (5th Cir. 1971); 464 F.2d 382 (5th Cir. 1972).

IAM (Govt. Br. 9-11).[11] The Government recognizes also that there were two separate seniority systems at the plant (one negotiated by USW and the Company, applicable to jobs in the USW bargaining unit, the other negotiated by IAM and the Company, applicable to jobs in the IAM bargaining unit), and that this lawsuit attacked only USW's system (Govt. Br. 13-14, n. 7; see also, R. Br. 38 n.43). Nevertheless, says the Government, the district court erred in not determining IAM's motive in 1941-42 with respect to the transfer of the jobs of 24 black employees from the IAM unit to the USW unit. That was error, we are told, because that transfer *may* have adversely affected the seniority status of the occupants of those jobs, and *if* the transfer did so, and *if* the IAM was motivated by race (cf. Govt. Br. 24), it can be said that the disadvantage suffered by the occupants of those jobs by reason of the innocently-motivated USW seniority system was the product of IAM's discriminatory motive in transferring the jobs, and to that limited extent the USW seniority system is not protected by § 703(h) (Govt. Br. 13-15). We respond by first stating the relevant facts, by next describing what is at stake, and by then showing the plain error in the Government's position.

a. It is undisputed that in 1941-42, shortly after the NLRB's certification of separate IAM and USW bargaining units, the jobs then held by 24 black employees were transferred from the IAM unit to the USW unit, with the consent of all parties and the approval of the NLRB.

---

[11] In this respect, the Government (at 9-10) expresses agreement with the point made in our opening brief (at 41 n. 43) that a court that finds only certain components of a seniority system discriminatorily motivated cannot invalidate the entire system. Section 703 (h) protects all employment decisions made pursuant to a seniority system except those that are "the result of an intention to discriminate because of race." And the congressional purpose in enacting § 703(h)—to protect the competitive seniority status of employees so long as that status is not the product of a racially-motivated seniority system—would be defeated if employees' competitive status that is not the product of discriminatory motivation were altered.

(Pullman Br. 5; R. Br. 31 n. 36). The transfer involved all 14 employees in the Truck Department, and 10 employees who were helpers in the Wheel & Axle Department. (R. Br. 31 n. 36; JA 247). The record does not indicate at whose initiative the transfer occurred—whether USW's, IAM's, or the affected employees.[12] Both courts below agreed that USW was motivated in agreeing to the transfer not by racial considerations but rather by its unwavering desire to expand its unit to include all employees in the plant regardless of race (App. 16a, 42a). The district court did not make a finding as to whether the transfer was the product of a desire by IAM to rid its unit of black employees, noting that the issue was contested but believing its resolution unnecessary (App. 42a); the Court of Appeals, disagreeing, did not remand for a finding by the district court, but instead proceeded to find on its own that the transfer resulted from racial motivation on the part of IAM (App. 15a)—a finding the Government says is *permitted* but that it concedes is not *compelled* by the record (Govt. Br. 24).[13]

(b) The Government recognizes that the transfer of the jobs even if badly motivated could have no significance

---

[12] The record shows that the jobs in question were not craft jobs, and that USW was unhappy with—indeed moved for reconsideration of—the NLRB's decision placing them in the IAM unit (JA 292). The record also shows that IAM was unhappy with the placement of these jobs in its unit, albeit willing to "accept" them (JA 207). The record is silent as to the desires of the 24 employees.

[13] Elsewhere in its brief, the Government asserts that the court of appeals was "correct" in declaring that IAM was motivated by race (Govt. Br. 11) and that that court "properly concluded" that IAM was so motivated (Govt. Br. 15). We assume that the Government in those passages means only that it was not clearly erroneous on this record for the court of appeals to make that finding; otherwise, these statements cannot be reconciled with that at Govt. Br. 24. In any event, as explained in USW Br. 46-47, 7a-8a, n. 3, a finding that the transfer was the product of discriminatory motivation is *not* compelled on this record, nor is it the most likely finding in light of USW's persistent efforts to have jobs in the IAM unit, held by whites *and* blacks, transferred into the USW unit.

to the validity of USW's seniority system unless the transfer altered the seniority rights of the occupants of the jobs, i.e. unless they were somehow "prejudiced" (Govt. Br. 14 n. 7). On that issue, the Government implicitly concedes that the transfer did not affect those employees' access to other jobs in the IAM unit; as the IAM had occupational seniority, those in a particular job in the IAM unit had no greater claim to other jobs in that unit than did employees in the USW unit (USW Br. 7a, n. 2; Govt. Br. 14 n. 7). But the Government suggests the *possibility*—conceding that a remand for "clarification" would be necessary to verify the possibility (Govt. Br. 14 n. 7)—that the transfer might have had a different (quite minor) seniority impact: assuming that one of these employees *were* able to secure a *different* job in the IAM unit, the USW agreement is clear that the employee by transferring to that job would forfeit his seniority in the former job, while the IAM agreement is silent as to whether a transferring employee from within the IAM unit forfeits his seniority in the former job (*ibid.*); thus, it is possible (subject to "clarification" on remand as to the meaning of the IAM agreement) that had these jobs remained in the IAM unit, the occupants would have had a seniority right upon obtaining a different job in the IAM unit that they did not enjoy in the USW unit: to return to their former job if, having attained this different job in the IAM unit, they were laid-off from that job.

In sum, the Government's contention that the USW seniority system is not protected by § 703(h) "to the extent the system was affected by the IAM's discriminatory maneuvers" (Govt. Br. 11) would, even if its factual predicates were proved, potentially affect a handful of employees and then only in the most speculative manner.

(c) The record shows that even if the jobs of the 24 employees had not been transferred to the USW unit in 1941-42, the jobs would have been transferred to the USW unit in 1944 for reasons that indisputably had nothing to do with race. As recounted at USW Br. 25,

n.39(3), USW's unwavering quest to bring all jobs into its bargaining unit bore fruit in 1944, when USW gained the support of a majority of the employees in the IAM unit. In that year, *all* of the non-craft jobs in the IAM unit (and some of the craft jobs as well) were ceded by IAM to USW, including all jobs in the Wheel & Axle Department that had not already been transferred in 1941-42; USW left to IAM only the jobs of certain "scabs" (all white) who had crossed USW's picket lines and whom USW therefore did not wish to represent. (Pullman Br. 6-7; USW Br. 25, n. 39(3), 46-47).

This subsequent event drains of all significance the motivation for the 1941-42 transfer. At most (i.e. even if it could be shown that the earlier transfer had been at IAM's instance and had been motivated by race), the victims of that transfer suffered an act of discrimination the effects of which ended in 1944, when their jobs would have been transferred to USW's unit in any event for reasons unrelated to race. That discrimination, which pre-dated enactment of Title VII by two decades, is not itself actionable under Title VII. Only if that discrimination were being perpetuated *after 1965* by the seniority system then in effect could there be a basis for inquiry under Title VII. But as the jobs in question would have been in the USW unit from 1944 forward anyway, for reasons unrelated to race, and as those jobs were treated equally with all others for seniority purposes under USW's agreements—a seniority system the Government concedes was properly found to have been negotiated without discriminatory purpose—USW's seniority system is not perpetuating the discrimination that arguably occurred until 1944. In this respect, the racial neutrality of USW's seniority system is indisputable: the majority of those whose jobs were transferred from the IAM unit to the USW unit were white,[14] and all were subjected to the single seniority

[14] All told, as a result of the 1941-42 and 1944 transfers, 96 whites and 28 blacks were transferred from the IAM unit to the USW unit (USW Br. 46-47, 5a, 7a n. 3).

disadvantage about which the Government complains (inability to preserve seniority on a USW-unit job when transferring to a job in the IAM unit.)[15]

IV. THE "JAMES" FACTORS

This Court has made plain that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63, 82. The "four factor" test first articulated by the Fifth Circuit in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, and relied on here by the Government and the respondents, constitutes the rigid methodology that court has imposed upon district courts in its Circuit for determining the answer in every case to the factual question whether "a discriminatory purpose" exists. That approach is an invitation to error, not enlightenment.

Divining an answer to the question whether the parties to a seniority system were actuated by a discriminatory purpose will not always be easy. For that reason, we do not share the confidence of others before this Court that a grand *schema* can be developed that will provide *the* method for eliciting that answer in every case. By listing certain items of evidence that may have probative value

---

[15] Even apart from this dispositive consideration which the Government overlooked, its own thesis would have required a remand to the district court for further fact-finding, rather than the partial affirmance it urges (Govt. Br. 30), for as we have shown, its thesis depends entirely upon two subsidiary facts as to which the district court had made no finding, and both of which the Government concedes could be found either way: the motivation underlying the 1941-42 transfer (Govt. Br. 24; see also USW Br. 46-47, 7a-8a, n. 3), and a determination whether occupants of the jobs in question would have had any greater seniority rights had their jobs remained in the IAM unit than they enjoyed in the USW unit (Govt. Br. 14 n. 7; see pp. 12-13, *supra*).

and not others that may be *more* probative, *James* artificially restricts the inquiry. The result here was that the court below—once it assumed the role of appellate fact-finder—concluded that the seniority system was invalid *without even considering* other evidence that powerfully suggested innocent motivation.

Here, the district court found, *inter alia*, that: blacks participated equally with whites in negotiating the system, the contemporaneous minutes of the negotiating process reveal no discriminatory purpose, blacks participated equally with whites in voting whether to approve the system negotiated, these votes did not divide along racial lines, blacks opposed some of the very changes in the seniority system that respondents contend would have been adopted had the parties not been racially motivated, and the system was the product of the desires of a union that pursued colorblind objectives. While the court below did not disturb these findings, at the critical point in its analysis these findings simply were ignored. The outcome was made to turn exclusively upon the *James* factors—factors that in this case were less reliable indicators of the purpose underlying the seniority system. The result was a "finding" that does not comport with the natural inference to be drawn from the totality of the facts.

With that general preface, we offer some observations about the intrinsic probative worth of the three items of evidence to which *James* directs particular attention.

1. Evidence that other forms of discrimination in the workplace were practiced at the time the seniority system was adopted is, as the district court recognized (App. 39a), double-edged. Depending upon the circumstances, it may be powerful evidence *rebutting* an inference of discriminatory purpose, rather than *supporting* such an inference. This is particularly so in the case of southern plants. Prior to 1965, it was not thought to be unlawful for private parties to engage in *overt* racial discrimination, and in the South particularly such

overt discrimination was commonplace. The social system was largely one of open discrimination openly arrived at. Those who wished to keep blacks out of "white" jobs had and used a straightforward means—a simple declaration that those jobs were "off-limits" to blacks. In the climate of that era and locale, it is far more likely than not that parties seeking to accomplish discrimination in their seniority system would construct an openly discriminatory system, not a facially neutral system. There was no need, actual or perceived, for careful deceptions. Those who openly assigned badge numbers, lockers, wage rates and jobs on the basis of race would not likely have been reluctant to be equally as open in assigning seniority rights on the basis of race.

Conversely, when, prior to 1965, parties in the South *did* construct seniority systems under which blacks were given the right to bid for "white" jobs—a right nowhere provided for in law or custom and not normally then accorded—it is unlikely that such neutral seniority components as might "discourage" the exercise of that right were motivated by race; if such discouragement was the parties' object they would not have created the right at all.

Moreover, certain types of seniority systems—e.g. those that made seniority applicable only to layoffs and recalls—simply *could not* have been motivated by race when adopted in plants where the employer practiced rigid job segregation. For in those situations seniority effectively determined only the rules by which whites competed against whites, and blacks against blacks; race was irrelevant to the operation of such systems, and thus could not have influenced their design.[16]

---

[16] That is, in fact, precisely what happened in the instant case. Until 1956, when USW finally succeeded in its long-standing quest to secure the application of seniority to promotions, seniority was applicable only to layoffs and recalls (USW Br. 14 and n. 27). During that period, as the Company assigned blacks only to "black"

2. That a seniority system does not conform to others in its industry may or may not invite suspicion as to its underlying motivation. Of course, that a seniority system *conforms* to industry practice, where the industry includes plants with few or no blacks at which race could not have been a motivating factor, would seem powerful evidence of its innocent motivation.[17] But this Court has

---

jobs, and whites only to "white" jobs, the seniority system regulated only the competition of blacks against blacks and whites against whites (*id.* at 18a). Yet it is during that period that all of the choices challenged here respecting the seniority system were made—both as to the measure of seniority and as to the units (departments) within which seniority would be exercised. As these choices had no racial consequences at the time they were made, it is irrational to infer that they were motivated by racial considerations. When, in 1956, the union finally succeeded in its quest to make seniority applicable to promotions—a success that under the system as it had previously been constructed invested, *inter alia*, blacks with the right to exercise seniority to bid to white jobs (USW Br. 14-15 and n. 28)—no change whatever was made in any other aspect of the system. The choices challenged in this case thus were made at a time when they had no racial consequences, and were not altered one iota when they *did* begin to have racial consequences.

[17] Indeed, even if the rare case could be imagined in which the court found from other particularized evidence that racial motivation entered into the parties' adoption of the same system as was in use throughout their industry including at virtually all-white plants, the court would be required to determine, if so requested by defendants, whether they had proved that the same system would have been adopted even had race not been considered. As explained in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 270-271 n. 21:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

recognized that diversity in seniority systems is the norm, *California Brewers Association v. Bryant*, 444 U.S. 598, 608, and the degree of suspicion due a deviation from industry practice should depend upon the persuasiveness (and credibility) of such innocent explanations as are offered for the deviation.

3. The question being one of intent, the weight warranted by evidence of disparate impact will vary from case to case. Section 703(h) does not come into play at all unless the seniority system has disparate impact (i.e. unless the employer engaged in pre-Act discrimination that continues to manifest itself in the location of the victims of that discrimination within his workforce). Where there has been such pre-Act discrimination, *any* traditional seniority system, no matter how innocently motivated, will produce *some* disparate impact. The degree of impact will inevitably reflect the degree of assignment discrimination that had occurred, and not necessarily the intention of those who created the seniority system. Thus, placing undo reliance upon evidence of impact as indicative of intent may well undermine § 703 (h) as interpreted in *Teamsters*. Moreover, where the evidence shows that the system disadvantageously affects a significant number of whites, the evidentiary worth of disparate impact—secondary at best—is further diminished. Parties whose purpose was to injure blacks would not likely have shaped their system to injure substantial numbers of whites as well. Thus, for example, proof that a system "locks" 60% of the blacks but only 40% of the whites into disadvantageous positions might establish disparate impact, but it would hardly be probative of discriminatory intent.

CONCLUSION

The decision of the Fifth Circuit should be reversed and the case remanded with an instruction to that court to affirm the judgment of the district court that the seniority system does not violate Title VII.

Respectfully submitted,

BERNARD KLEIMAN
General Counsel
United Steelworkers of America, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
United Steelworkers of America, AFL-CIO
Five Gateway Center
Pittsburgh, Pennsylvania 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
AFL-CIO
815 - 16th Street, N.W.
Washington, D.C. 20006

JEROME A. COOPER
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Alabama 35203

Attorneys for Petitioners, United Steelworkers of America, AFL-CIO and Local 1466, United Steelworkers of America, AFL-CIO

APPENDIX

APPENDIX

DEFECTS IN RESPONDENTS' STATISTICAL ANALYSIS TENDERED IN APPENDIX B TO THEIR BRIEF

Had respondents sought to introduce the tables in Appendix B into evidence in the district court, USW would have been able to make a record demonstrating the arithmetical errors in the construction of those tables, and through the testimony of a statistical expert to show that the tables do not in any event prove the point for which they are proffered. This Court's rules contain no procedure by which exhibits "moved into evidence" at *this* level may be impeached. Accordingly, we undertake here to describe the most glaring defects in respondents' attempted showing.[1]

1. The critical choices respecting the seniority system whose motivation respondents challenge all were made between 1941 and 1954 (R. Br. 37; App. 3a, 26a). Yet respondents' proffered statistics relate to the distribution of employees in 1956 and 1964. Obviously, parties in making decisions between 1941 and 1954 could not have been motivated by distributions of employees that did not then exist.[2] The use of data from an inapposite period cannot

---

[1] What follows is derived in some part from expert advice transmitted to counsel by a renowned expert in statistics who is experienced, *inter alia*, in the analysis of statistics in Title VII cases. That expert is Dr. Samuel S. Shapiro, professor and Chairperson of the Department of Mathematical Sciences, Florida International University.

[2] Respondents suggest that they chose to analyze data for 1956 because that was "the date when the seniority system had fully evolved" (P. Br. 52). But the only seniority event in 1956 was the decision to make seniority applicable to promotions—a decision that respondents do not challenge and that plainly was *not* discrimi-

even be explained on the basis that data from more pertinent periods were unavailable; the record contains sources from which the departmental distributions can be determined for 1941 (JA 103), and for each year from 1947 through 1954 (P. Exs. 2-9 (1978 Trial)). Nor is there reason to assume that what was true in the later years analyzed by respondents necessarily was true in the years in which the critical seniority choices were made. Respondents' own purported findings are that the degree of "disproportionality" increased significantly between 1956 and 1964 (R. Br. 51-52); if anything can be "inferred" from that trend, it is that the choice of earlier (and more relevant) years would have reflected less "disproportionality." In this respect, it is useful to note as examples that the Paint Department, found by respondents to be "disproportionally white" in 1956 (R. Br. App. B, Table 2), mirrored the relative black-white ratio in the plant almost precisely in 1941 (JA 103), and that the Punch & Shear Department, also found by respondents to be "disproportionally white" in 1956 (Table 2), had an entirely different racial composition in 1941, with blacks exceeding their ratio in the plant as a whole (JA 103).

2. If statistical analyses are to have any credibility at all, they must begin with accurate raw numbers. Respondents, however, have produced tables whose raw numbers deviate substantially from the data in the

---

natorily motivated, as it created for the first time a right for black employees to promote to "white" jobs (USW Br. 14-15 and n. 28). The irrelevancy of respondents' whole endeavor is reflected in the perception that on respondents' thesis the 1956 data would warrant an inference of discriminatory motivation in the seniority decision made that year, i.e. that in deciding to provide blacks seniority access to formerly "white" jobs the parties were motivated by racial hostility.

Respondents offer no explanation as to the relevance of data for 1964, which is literally a decade after the last seniority choice was made that is challenged as discriminatory.

"sources" from which they are claimed to have been derived. This is most readily apparent from Table 1, whose raw numbers (said to be derived from P. Ex. 2 (1974 Trial), see R. Br. App. B, p. 7) indicate that in 1964 there were 3,875 employees in the plant of whom nearly two-thirds were white. We have conducted an independent tabulation from that same "source", and have found that what it actually shows is almost precisely what the district court *found* that it shows when that court undertook a similar tabulation using the same data source (App. 128a): that there were less than 2400 employees in the plant, of whom only approximately one-half were white.[3] That the counts conducted by the district court and by us are correct, and respondents' wrong, is independently confirmed by the exhibit at JA 90, which shows that at no time in 1964 did the plant population exceed 2400 employees (indeed, at no time in modern history did it exceed 2800); by the findings of both courts below that 2800 was as high as the plant population ever rose (App. 68a, 128a); and by the finding of the court of appeals that "Pullman's work force, depending upon the time selected, ranges from forty-five to almost fifty percent black" (App. 4a), a finding consistent with that of the district court (App. 120a, and n.10).

---

[3] The biggest error in respondents' arithmetic—albeit by no means the only one—is the "discovery" of approximately 1,000 more whites in the Welding Department than appear on the source exhibit (cf. Respondents' Table 1 with App. 128a). We have considered the possibility that respondents despite their stated purpose in conducting the count to "reflect[] the employment composition at the plant on" a given "date", R. Br. 51 n. 59, mistakenly counted everyone on the source exhibit irrespective of when he was shown as employed (the source exhibit includes persons who worked in each department at *any* time during a 13-month period, and this is a methodological error that respondents had made before (1974 R. 722-725)). But even that cannot explain the figures on respondents' Table 1 for the Welding Department, which by that hypothesis would still show 636 more whites than appear in the source exhibit, albeit 30 less blacks than appear therein.

This error in raw numbers[4] is doubly fatal to the credibility of respondents' statistical analysis. In the first place, it is self-evident that if respondents have not accurately reported the number of white and black employees in a department, statistical calculations made on incorrect raw numbers will produce incorrect conclusions. Secondly, as respondents have proceeded on the assumption that the plant was two-thirds white, when in fact it was only one-half white, they have produced a meaningless result: they have tested to determine in which departments the populations deviated "significantly" from an "expected" ratio of two-thirds white; but the results of those tests can hardly be probative of anything in a plant that was only one-half white.

3. Respondents' approach contains a methodological flaw commonly committed when laymen undertake statistical analyses: respondents have proceeded on the incorrect assumption that the racial distribution in each department is a result independent of the racial distribution in each other department, i.e. they have tested the black-white ratio in each department against the black-white ratio in the plant as a whole. But as the number of blacks and whites in the total workforce is fixed, a disproportion in a single department will mean that the "expected" ratio of assignments of all other employees among the remaining departments would change, for the "pool" of black and white employees distributed among the remaining departments would not have the same black-white ratio as the total plant population. Thus, if the number of blacks in one department is disproportionately high, the "expected" number of blacks in all other departments should be lower. But under respondents' erroneous methodology, the finding of a department with a significantly high

---

[4] The same defect inheres in Respondents' Table 3, which contains virtually the same erroneous numbers as Table 1.

number of blacks does not alter the "expected" number in the other departments, and thus inevitably creates the probability that other departments will be found to have a significantly low number; if one or two departments have an extreme racial disproportion, a number of other departments might erroneously appear, under respondents' methodology, to have the opposite disproportion. There are statistical procedures to control for the interdependence of the racial distributions in each department, but respondents did not employ such procedures. In consequence, respondents' purported "findings" result from a flawed statistical analysis. And, significantly, the effects of respondents' methodological error run only in one direction: the error is bound to *increase* the *apparent* extent of racial disproportionality beyond that which would result were proper statistical methods used.

4. We have thus far discussed respondents' analysis as though it had something to do with the lone factual issue posed in this case—the motivation underlying the seniority system—simply to show the errors in methodology and application. In fact, however, respondents' statistical analysis, even if properly done, would be meaningless as a basis for drawing inferences as to the motivation of the seniority system.

There is more to statistics than the mechanical application of statistical tests to data. First and foremost, the appropriate use of statistical procedures requires that the tests employed be addressed to the question for which an answer is being sought. Whether certain data reveal a pattern that is "statistically significant" may depend entirely on what question is being asked. In their brief, respondents describe their statistical analysis as establishing which departments at the Pullman-Standard Bessemer plant are "racially identifiable departments". R. Br. at 50, and n.58. But the analysis they have employed is not a basis for any such conclusion.

As is accurately stated in the "Methodology" section of Appendix B, the statistical analysis performed in Tables 1 and 2 does no more than test the hypothesis that the "decisions [assigning employees to the various departments] were made randomly with respect to race," App. B at pp. 1, 3—in other words, the hypothesis tested by the statistical analysis employed is that race played no part in the assignment of employees to the various departments. But no party to this case disputes that race in fact did play a part in job assignments made prior to the 1956 and 1964 dates that the tables focus on. The statistical analysis employed by respondents is thus directed at a question that has already been answered. It is not directed, however, at the question of which departments are "racially identifiable."

Depending on the size of the population studied, the hypothesis that race played no part in a process may be negated by the slightest difference between the proportion of blacks expected to emerge from the process and the proportion of blacks that actually does emerge. Thus, there may be a finding of "statistical significance" when the actual proportional differences would not be discernable to laymen upon normal observation. It is wrong to link the phrase "racially identifiable" to a finding of "statistical significance" that merely negates the hypothesis that race played no part in a process.

Further, by attempting to make that very linkage, respondents end up with a definition of "racially identifiable departments" that makes no sense in a case such as this, where the issue is the motivation underlying the seniority system, not the validity of the assignment process. Thus, respondents' analysis leads them to label several departments in Table 1 as identifiable "black" departments even though a majority of the employees in the departments were white: Forge Department (53 whites; 42 blacks); Paint & Shipping Department (143 whites, 129 blacks); Wood Erection Department (90

whites; 73 blacks). Manifestly, that the seniority system "locks" employees into these departments could not be probative of anti-black motivation. More generally, as the parties who negotiated the seniority system did not perform statistical analyses but at most had a knowledge of the numbers of blacks and whites in each department, it is wrong to employ statistics at all to assess their motivations. The only "fact" from which any inference conceivably could be drawn is the "fact" of the actual numbers of whites and blacks in each department at the time seniority choices were made. If an inference of discriminatory motivation could not be drawn from *that* "fact" (i.e. from the information the parties might conceivably have possessed when they negotiated) the gap cannot be closed by generating abstract data that were *not* known to the parties when they made seniority choices.

That respondents' analysis is misdirected is illustrated by applying it to the facts of *Teamsters*. If respondents had performed their statistical analysis upon the data in *Teamsters*, and done it properly, they would have found that there was "serious disproportionality" in both the city driver and line driver units, i.e. that *100%* of the employees were in "racially identifiable departments." Under respondents' analysis, that result would be the most conclusive indicator of discriminatory intent that the analysis could produce. But it would fly in the face of what was intuitively obvious in *Teamsters*: that an inference of bad motive could not be drawn from the relative numbers of blacks and whites in the units in operation there. This example—as well as that furnished *supra*, 1a-2a, n. 2—shows that respondents' exercise is not designed to produce a result relevant to the question of discriminatory purpose.

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1190 and 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT AND WILLIE JOHNSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
DAVID H. LARRY
McGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for the Amicus Curiae Equal Employment Advisory Council

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
A. This Court Has Already Rejected Efforts By the Fifth Circuit To Establish a Rule That Title VII Is Violated By a Neutral Seniority System's Perpetuation of an Employer's Past Discrimination..	5
B. A Neutral System Is Bona Fide Within the Meaning of Section 703(h) of Title VII Unless It Was Adopted or Has Been Applied With Discriminatory Purpose	11
C. The Fifth Circuit's "Four Factor" Test, Purportedly Based Upon Language From *Teamsters*, Undermines This Court's Holding in That Case, and Returns The Law of The Fifth Circuit To Its Discredited Pre-*Teamsters* Principles	15
a. Factor (1)—"Whether the Seniority System Operates to Discourage All Employees Equally From Transferring Between Seniority Units"	17
b. Factor (2)—"Whether the Seniority Units Are In the Same or Separate Bargaining Units (If the Latter, Whether That Structure Is Rational and In Conformance With Industry Practice)"	20
c. Factors (3) and (4)—"Whether the Seniority System Had Its Genesis In Racial Discrimination" and "Whether the System Was Negotiated and Has Been Maintained Free From Any Illegal Purpose"	25
CONCLUSION	30

AUTHORITIES CITED

Cases: Page

Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949) 21
California Brewers Association v. Bryant, 444 U.S. 598, 100 S. Ct. 814 (1980) 2, 10, 13, 20, 21
Carroll v. United Steelworkers of America, AFL-CIO-CLC, 498 F. Supp. 976 (D. Md. 1980), *aff'd* 639 F.2d 779 (4th Cir. 1980) 18, 22
Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980) 5, 16, 24
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 21
Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976) 29
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 10
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 11
Harris v. Plastics Mfg. Co., 617 F.2d 438 (5th Cir. 1980) 5, 24
James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) ..... *passim*
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ..... *passim*
Local 189, United Papermakers & Paperworkers, AFL-CIO-CLC v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 9 (1970) ..... *passim*
Parson v. Kaiser Aluminum & Chemical Corp., 583 F.2d 132 (5th Cir. 1978) 13
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 14, 15
Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 431 U.S. 1115 (1979) 5, 6
H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 21
Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) ..... *passim*
Southbridge Plastics Division v. Local 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, 565 F.2d 913 (5th Cir. 1978) 14, 24

AUTHORITIES CITED—Continued

Page

Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980) 5, 13, 16, 17, 23, 24, 26, 27
Swint v. Pullman-Standard, —— F. Supp. ——, 17 FEP Cases 730 (N.D. Ala. 1978) 3, 8, 18, 19, 22, 25, 26, 28
Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981) ..... *passim*
Texas Dept. of Community Affairs v. Burdine, —— U.S. ——, 101 S. Ct. 1089 (1981) 10
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 2, 14, 21
United Air Lines v. Evans, 431 U.S. 553 (1977) .. 2
United States v. Georgia Power Co., 3 EPD ¶ 8318 (N.D. Ga. 1971) 24, 26
United States v. Georgia Power Co., 470 F. Supp. 649 (N.D. Ga. 1979) 26
United States v. Georgia Power Co., 634 F.2d 929 (1981), *petition for cert. pending*, 49 L.W. 3969 (U.S. June 30, 1981) 5, 13, 16, 17, 18, 23, 26, 27
United Steelworkers of America, AFL-CIO-CLC v. Weber, 433 U.S. 193 (1979) 10, 21

Statutes:

Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) ..... *passim*
Section 701(j) 21
Section 703(h) ..... *passim*
National Labor Relations Act, 29 U.S.C. § 151 *et seq.*
Section 9(b) [29 U.S.C. § 159(b)] 20

Miscellaneous:

Black's Law Dictionary (rev'd 4th ed. 1968) 12
Bureau of National Affairs, Collective Bargaining, Negotiations and Contracts, Vol. 1, Techniques and Trends; Current Settlements (1980) 22
Morris, *Developing Labor Law* (1971) 20
Schlei and Grossman, *Employment Discrimination Law*, 1979 Supp. 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1190 and 80-1193

PULLMAN-STANDARD, a Division of Pullman, Incorporated, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT AND WILLIE JOHNSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose

---

[1] Their consents have been filed with the Clerk of the Court.

combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members or their constituents are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the Court of Appeals for the Fifth Circuit has adopted incorrect legal criteria for determining a seniority system's "bona fides" within the meaning of Section 703(h) of Title VII.[2]

STATEMENT OF THE CASE

Plaintiffs in this class action employment discrimination suit claimed, *inter alia*, that the departmental seniority system contained in a collective bargaining agreement between Pullman-Standard and Local 1466 of the United Steelworkers of America was established and maintained with a racially discriminatory purpose, and that the system's perpetuation of the effects of the employer's prior discrimination is, therefore, not protected by § 703 (h) of Title VII.[3] After a trial, and pursuant to a four-factor analysis advanced by the Fifth Circuit in *James*

---

[2] Because of its interest in issues involving interpretation of Section 703(h) of Title VII, EEAC has filed briefs as Amicus Curiae with this Court in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines v. Evans*, 431 U.S. 553 (1977); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

[3] § 703(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), the district court found that: (1) the seniority system is facially neutral and applies equally to all races and ethnic groups; (2) the seniority units are rational in accord with industry practice and N.L.R.B. precedent; (3) the seniority system had its genesis at a time when racial discrimination was widespread but not as a result of, or in furtherance of, such discrimination; and (4) the seniority system was negotiated and had been maintained free from any discriminatory purpose. *Swint v. Pullman-Standard*, —— F. Supp. ——, 17 FEP Cases 730,733-39 (N.D. Ala. 1978). Accordingly, the district court found that the seniority system is bona fide within the meaning of § 703(h).

On review, the Fifth Circuit rejected the district court's finding that the seniority system is bona fide. The circuit court inferred a discriminatory purpose in the negotiation and maintenance of the seniority system by construing the facts to show that the system, which reflects Pullman-Standard's departmental structure, was negotiated and instituted during a time when discrimination was prevalent in the area and the employer's discriminatory hiring and assignment policies resulted in segregated departments. In reaching this conclusion, the court also relied heavily upon the discriminatory policies and practices of another union (the International Association of Machinists) which was not and is not party to the collective bargaining agreement containing the seniority system at issue in this case. *Swint v. Pullman-Standard*, 624 F.2d 525, 530-34 (5th Cir. 1980).

SUMMARY OF ARGUMENT

The importance of collectively-bargained seniority systems, as well as the inevitable variety of such systems, has been recognized by Congress and this Court. In § 703 (h) of Title VII, Congress protected the rights vested under a bona fide seniority system, even if, as this Court made clear in *International Brotherhood of Teamsters v.*

United States, 431 U.S. 324 (1977), the neutral operation of the system perpetuates the effects of prior discrimination by the employer. In so holding, this Court rejected the contrary reasoning of *Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980 (5th Cir. 1969), and its progeny, and recognized that intent to discriminate must be shown if a seniority system is to be held unprotected by § 703 (h). Significantly, the Court also emphasized that Congress, in legislating to protect bona fide seniority systems, did not intend "to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems." *Teamsters, supra*, 431 U.S. at 355, n.41.

In this case, as in most of its post-*Teamsters* Title VII seniority decisions, the Fifth Circuit has applied an erroneous "four-factor" test purportedly derived from language in the *Teamsters* decision.[4] Thus, in assessing the legality of a seniority system, the Fifth Circuit examines:

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> 3) whether the seniority system had its genesis in racial discrimination; and
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose. *James, supra*, 559 F.2d, at 352.

As written, the Fifth Circuit's test variously misconstrues, misstates or shifts the emphasis of this Court's language. As applied by the court, the "four factor analysis" simply provides a new framework for justifying a finding, in this case and others, that if the effects of an employer's prior discrimination are per-

---

[4] *See, Teamsters, supra*, 431 U.S. at 355, quoted *infra* at p. 15.

petuated by the neutral operation of a seniority system of less-than-plant-wide scope negotiated during a period of prevalent discrimination by the employer or in the community, discriminatory intent may also be inferred *ipso facto* with regard to the negotiation and maintenance of the seniority system. The court's analysis, therefore, returns the law of the Fifth Circuit to its discredited pre-*Teamsters* principles and, contrary to the will of Congress and the teachings of this Court, unnecessarily and improperly invalidates neutral seniority systems.

ARGUMENT

A. This Court Has Already Rejected Efforts by the Fifth Circuit to Establish a Rule That Title VII Is Violated by a Neutral Seniority System's Perpetuation of an Employer's Past Discrimination

The Fifth Circuit's current approach to the issue of the bona fides of seniority systems, as it appears in the decision below and other cases,[5] has been developed in response to this Court's decision in *Teamsters*. In order that the Fifth Circuit's reasoning may be seen in its context, discussion of the circuit court's analysis must be preceded by an examination of the *Teamsters* decision—what it held and what it rejected.

In *Teamsters*, this Court was called upon to decide whether § 703(h) validated an "otherwise bona fide seniority system" that perpetuated the effects of an employer's pre-Act discrimination and afforded "no constructive seniority" to the victims of such discrimination. *Teamsters*, *supra*, 431 U.S. at 348. The Court observed that:

---

[5] *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112 (1981); *United States v. Georgia Power Co.*, 634 F.2d 929 (1981); *Swint v. Pullman-Standard*, 624 F.2d 525 (1980); *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (1980); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527 (1980); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (1978); and *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310 (1977).

> [T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. *Id.* at 352-53.

Accordingly, as the Court held, "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.*, at 353-54.

In so holding, the Court squarely rejected "the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be 'bona fide,'" (*id.*, at 353), as well as "the reasoning of the long line of cases which had held that a seniority and transfer system constituted present discrimination and violated Title VII if it perpetuated into the present the effects of pre-Act discrimination."[6] The "bedrock" of the rejected reasoning lies in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), and *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States* (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

In *Local 189*, the Fifth Circuit set out a number of "principles" that cannot be said to have survived this Court's decision in *Teamsters*. The court of appeals had

---

[6] Schlei and Grossman, Employment Discrimination Law, 1979 Supp. 6 (1979).

adopted the *Quarles* court's construction of § 703(h), *i.e.*, that "a racially discriminatory seniority system established before the act is [not] a *bona fide* seniority system under the act." *Local 189*, *supra*, 416 F.2d at 988, quoting *Quarles*, *supra*, 279 F. Supp. at 517. It is apparent that the Fifth Circuit viewed as racially discriminatory any seniority system that perpetuated the effects of past discrimination:

> It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employees *present* right not to be discriminated against on the ground of race. *Local 189*, *supra*, 416 F.2d at 988, emphasis in original.

The Fifth Circuit rejected the contention that such a seniority system which embodies no intent to discriminate is protected by § 703(h). The court held instead that the "requisite intent may be inferred from the fact that the defendants persisted in the conduct [*i.e.*, continued to maintain the seniority system] after its racial implications had become known to them." *Id.* at 995-97. Thus, in the court's view, mere perpetuation by a seniority system of the effects of prior discrimination supported an inference that the system was not bona fide and that the differences in wages or working conditions that derived from operation of the system were the result of an intent to discriminate.

Under the *Local 189* approach, if the employer and the union could not demonstrate that the seniority system was justified by "an overriding legitimate, nonracial business purpose," *i.e.*, that the particular seniority system was required by considerations of "safety and efficiency," then such a system "constitutes on-going discrimination." *Id.* at 989, 994. Significantly, the court was of the opinion that, in enacting § 703(h), Congress preferred some forms of seniority systems over others—specifically, that plant-wide or "mill seniority" was pre-

ferred over job or departmental seniority, which latter forms the court viewed as inherently discriminatory.[7]

In *Teamsters*, this Court rejected, implicitly or explicitly, all of the major elements of the Fifth Circuit's conceptual framework as it appeared in *Local 189*. Thus, this Court's core holding, that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination," 431 U.S. at 353-54, forthrightly rejected the *Quarles/Local 189* view "that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination." *See* 431 U.S. at 346, n.28.[8]

---

[7] "Job seniority, embodying as it does, the racially determined effects of a biased past, constitutes a form of present racial discrimination." *Local 189, supra*, 416 F.2d at 990.

"As the court pointed out in *Quarles*, the treatment of 'job' or 'departmental' seniority raises problems different from those discussed in the Senate debates: 'a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system.' 279 F. Supp. at 517." *Local 189*, 416 F.2d at 994-95.

The term "genesis in racial discrimination" was first applied to seniority systems in *Quarles*. As more fully discussed below (pp. 25-29), this term has been used in an undefined and highly suggestive manner by the Fifth Circuit in its post-*Teamsters* decisions. For this reason, it is important to observe that the facts of *Quarles*, as set forth by the district court (279 F. Supp. at 510-13), show that there was no suggestion that the seniority system was negotiated with an *intent* to discriminate. Accordingly, it is clear that the *Quarles* court viewed "genesis in discrimination" not as a "causative" concept but rather as something like "arising within a context of contemporaneous discrimination by the employer." *See id.* at 517. And *compare Swint v. Pullman-Standard*, 17 FEP Cases 730, 737 and n.20 (N.D. Ala. 1978), wherein the district court puzzled over the Fifth Circuit's ambiguous use of the term "genesis in discrimination." As discussed below, the "contemporaneous" interpretation of "genesis in discrimination," which was rejected by this Court in *Teamsters* (*see* 431 U.S. at 346, n.28, and discussion *infra* at n.8) is a crucial element in the Fifth Circuit's current approach to analyzing the bona fides of seniority systems.

[8] The *Teamsters* decision (at n.28) suggested a way in which *Quarles, et al.*, could be harmonized:

As in *Quarles* and *Local 189*, the facts of *Teamsters* showed a history of pre-Act discrimination by the employer in hiring and assignment, as well as a seniority system, negotiated and instituted well before the effective date of the Act, that "tracked" departmental assignments and tended to discourage transfers to more lucrative and desirable jobs. 431 U.S. at 349-50. The Court observed that "[t]his disproportionate distribution of advantages does in a very real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.'" *Id.* at 350. It would be disingenuous to suggest that either the parties to the collective bargaining agreements in *Teamsters* or the employees in the bargaining units were unaware of this effect. Accordingly, as more fully discussed below, it is apparent that this Court did not follow the Fifth Circuit's suggestion that "intent to discriminate" vis-a-vis the neutral operation of a seniority system can be "inferred"

Insofar as the result in *Quarles* and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," 279 F. Supp. at 517, the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.

In view of its holding that mere "perpetuation" will not support a finding that a seniority system is unlawfully discriminatory, the Court was thus making it clear that a showing of *intent* to discriminate would be necessary to sustain a finding that a seniority system was racially discriminatory or had its "genesis" in discrimination. As noted above, however (n.7), the facts of *Quarles* suggest no such intent, and there is nothing in the district court's opinion indicating that the lower court perceived an intent to discriminate in anything but the employer's pre-Act hiring policies. The court simply saw that "[t]he differences that originated before the Act are maintained now" by the seniority system, and held that "the present differences in departmental seniority of Negroes and white (sic) that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the *proviso* of § 703(h)" 279 F. Supp. at 517-18.

if the parties to the collective bargaining agreement are "aware" that the system perpetuates certain effects of prior discrimination by the employer.

The Court's holding in *Teamsters* that § 703(h) protects "the routine application of a bona fide seniority system" (431 U.S. at 352), coupled with its observation that Congress was extending equal protection to all bona fide seniority systems (and not just plant-wide systems) (*id.* at 355, n.41), make it clear that the Fifth Circuit's "business necessity doctrine" is irrelevant to the issue of the applicability of § 703(h). This Court emphasized that "[a]lthough a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in" cases where "the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes" (*id.* at 352-53), Congress had "considered this very effect" (*id.* at 350), and had, nonetheless, immunized application of bona fide seniority systems (*id.* at 352).

That the system under consideration in a particular case might not be *necessitated* by considerations of safety and efficiency, or that the parties might have negotiated some other seniority scheme that would have had an equal "safety and efficiency quotient" but a lower "perpetuation quotient," are issues that have no bearing on the legality of the seniority system under Title VII. Congress did not want the courts to "second guess" the parties to a collective agreement, but insisted instead that seniority rights vested under *any* bona fide seniority system be respected, even if the system perpetuated the effects of prior discrimination. *See, California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980); *Teamsters*, 431 U.S. at 350-51. And *see Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); *Steelworkers v. Weber*, 443 U.S. 193, 205-206 (1979); and *Texas Dept. of Community Affairs v. Burdine*, —— U.S. ——, 101 S.Ct. 1089,

1096 (1981) (Title VII "was not intended to 'diminish traditional management prerogatives.' ").

Against this background, it is evident that the Court saw § 703(h) as requiring that an analysis of the legal effect of a seniority system proceed differently than in other "disparate impact" cases.[9] Thus, while the *Griggs* (disparate impact) approach would require that an employment practice fair in form but discriminatory in operation must be justified by business necessity to avoid Title VII liability [*Griggs v. Duke Power Company*, 401 U.S 424, 429-32 (1971)], a neutral seniority system that perpetuates the effects of past discrimination need only be "bona fide" in order to be valid under Title VII.

B. A Neutral System Is Bona Fide Within the Meaning of Section 703(h) of Title VII Unless It Was Adopted or Has Been Applied With Discriminatory Purpose

The Court observed in *Teamsters* that § 703(h) protects only bona fide seniority systems, and that a proviso "requires that any differences in treatment not be the result of an intention to discriminate." 431 U.S. at 353. And the Court had earlier observed that certain lower court decisions, which arguably depended upon findings that the seniority systems at issue "were themselves 'racially discriminatory' or had their 'genesis in racial discrimination,' . . . can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption." *Id.* at 346, n.28 (quoted at n.8, *supra*). In this light, the Court's rejection of the "Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be 'bona fide'," buttresses the Court's implicit holding that the *Griggs* approach to disparate impact cases is inapplicable to an analysis under § 703(h) and its rejection of the Fifth Circuit's sugges-

[9] *See, Teamsters*, 431 U.S. at 349 ("Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale."); and *id.* at 335, n.15.

tion that discriminatory intent can be inferred from perpetuation.

The Government's argument apparently was based upon the assumption that intent to discriminate, or lack of bona fides, which would remove a facially neutral seniority system from § 703(h)'s protection, could be *inferred* from the seniority system's mere perpetuation of prior discrimination. As the Court observed, however, "reading the words 'bona fide' as the Government would have us do" would "disembowel § 703(h)" and "pervert the Congressional purpose" of protecting employees' vested seniority rights, "even where the employer has engaged in pre-Act discriminatory hiring or promotion practices." *Id.* at 353-355 and n.38.

Because perpetuation of past discrimination via the application of a bona fide seniority system does not violate the Act, and because intent to discriminate may not be inferred from the mere fact of such perpetuation, the statutory meaning of "bona fide" is crucial. Black's Law Dictionary defines "bona fide" as follows:

> BONA FIDE. In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned. Black's Law Dictionary 223, Rev'd Fourth Ed. (1968).

There are, thus, two distinct concepts at play in the accepted usage of the term "bona fide." The first concerns "honesty" or "lack of pretense or deception;" the second has to do with "genuineness." [10] Most cases assessing the bona fides of a seniority system under § 703(h) address the honesty/deception issue rather than the genuineness

[10] Concededly, the two concepts may be viewed as interrelated in that it is "dishonest" to claim "genuineness" for something that is not genuine. For the purposes of this discussion, however, the two senses of "bona fide" are treated as distinct, since, as discussed below, the distinction is implicit in the cases addressing the "bona fides" of particular seniority systems.

of the seniority system *qua* seniority system.[11] Specifically, with the exception of *Parson v. Kaiser Aluminum & Chemical Corp.*, 583 F.2d 132 (5th Cir. 1978), none of the Fifth Circuit's post-*Teamsters* decisions have suggested that the seniority rules at issue were not really seniority systems.[12] Rather, those decisions have given lip service to the proposition that a seniority system neutral on its face and in application is bona fide unless it is shown that the system was devised and has been maintained, at least in part, for the dishonest or hidden *purpose* of locking minority employees into jobs or departments where the employer had originally and discriminatorily assigned them.[13]

---

[11] An exception, of course, is *California Brewers Association v. Bryant*, 444 U.S. 598 (1980). In that case, plaintiffs contended that a threshold requirement for entering a seniority track was not a genuine "seniority" rule, and, therefore, the seniority system in question was not a bona fide system entitled to the protection of § 703(h). The Court noted that "in order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions. . . . Rules that serve these necessary purposes do not fall outside § 703(h) simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time." 444 U.S. at 607-608, footnotes omitted.

[12] *Parson*, decided prior to *California Brewers*, held that a "ten-day bottom entry requirement is not a seniority rule at all" and thus is not "immunized by § 703(h)." 583 F.2d at 133.

[13] *See, e.g., James v. Stockham Valves, supra*, 559 F.2d 310, 351 ("As we read the *Teamsters* opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide."); *Swint v. Pullman-Standard, supra*, 624 F.2d 525, 530 (citing the above-quoted principle from *Stockham Valves*) and 533 ("there is no doubt, based upon the record in this case, about the existence of a discriminatory purpose."); *United States v. Georgia Power Co., supra*, 634 F.2d 929, 935 ("the issue under *James* and our subsequent decisions, however, is whether the *totality* of the circumstances demonstrates purposeful discrimination."); and *Terrell v. United States Pipe & Foundry Co., supra*, 644 F.2d 1112, 1116 ("The court correctly recognized that in order for a seniority system to be bona fide under § 703(h) of Title VII, it must not

If the "dishonesty" or discriminatory purpose theory is not to be self-contradictory, however, the lack of bona fides cannot be "accidental"—the apparent neutrality of the system must be, in fact, a deliberate sham to hide the discriminatory purpose. Conversely, a facially neutral seniority system which was negotiated and has been maintained and applied without any intent to discriminate cannot be other than bona fide. Accordingly, the clear implication of the Supreme Court's refusal in *Teamsters* to infer discriminatory intent from the mere perpetuation of the effects of prior discrimination is that specific intent to discriminate must be proved.[14] In other words, there must be evidence (beyond mere "perpetuation") showing or supporting an inference that an "intent to discriminate entered into [the] very adoption" of the seniority system (431 U.S. at 346, n.28), or that, in the words of the proviso to § 703(h), "differences [in "terms, conditions, or privileges of employment"] are the result of an intention to discriminate. . . ." As this Court observed in *Personnel Administrator of Massachusetts v.*

---

have been created or maintained with the intention to discriminate.").

In one post-*Teamsters* case, however, a Fifth Circuit panel gave this proposition more than mere lip service. Thus, the court in *Southbridge Plastics Division v. Local 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 565 F.2d 913 (1978), making no reference to the recently decided *James* decision, held, following *Teamsters*, that a "discriminatory purpose must be shown before a seniority system can be exempted from § 703(h)'s protection." *Id.* at 916. As there had been no such showing, the court refused to permit an EEOC conciliation agreement to override the parties' departmental seniority system, even though the system might perpetuate the effects of the employer's prior discrimination. *Id.*

[14] "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977). In circumstances where "the operation of the seniority system itself is said to violate Title VII. . . ., § 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." *Id.* at n.13.

Feeney, 442 U.S. 256 (1979), "'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279, footnotes and citations omitted.

C. The Fifth Circuit's "Four Factor" Test, Purportedly Based Upon Language From *Teamsters*, Undermines This Court's Holding in That Case, and Returns The Law of The Fifth Circuit To Its Discredited Pre-*Teamsters* Principles

In the penultimate paragraph of its analysis of the legality of the seniority system in *Teamsters*, this Court summarized a number of factors supporting its conclusion that "[t]he seniority system in this litigation is entirely bona fide." 431 U.S. at 355.

> It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational in accord with the industry practice, and consistent with National Labor Relations Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. *Id.* at 355-56, footnoes omitted.

As fully discussed above (pp. 11-15), it is apparent that this Court viewed proof of specific discriminatory intent as a prerequisite to holding a seniority system not bona fide. The above-quoted passage from *Teamsters* was not advanced as a necessary analytical framework but simply as the Court's summary of the circumstances of that case which confirmed the finding that the sen-

iority system at issue was bona fide within the meaning of the statute, that the system was not adopted or applied with discriminatory purpose. The Fifth Circuit, however, in *James v. Stockham Valves*, transmuted that summary of circumstances into what has become the court's test for deciding whether a seniority system is bona fide within the meaning of § 703(h).[15] The court's error in assuming that the paragraph from *Teamsters* was intended as a "test" is compounded by the fact that, in restating and applying the elements of that paragraph, the Fifth Circuit, as discussed below, has misunderstood or misrepresented this Court's points, and has, apparently, tended to recast or "improvise upon" the facts of a case in order to justify its results.[16] As now shown, the Fifth Circuit continues to decide Title VII seniority cases, albeit under what is advanced as a *Teamsters*-derived test, in much the same fashion as it did prior to the Supreme Court's decision.

In *James Stockham Valves*, the Fifth Circuit held that the Supreme Court's *Teamsters* decision had "focused on four factors" for analyzing "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system," and thus whether the system is or is not bona fide. 559 F.2d at 351-52. Those "factors" are:

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

---

[15] *See, e.g., James v. Stockham Valves, supra*, 559 F.2d at 352; *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1192; *Fisher v. Procter & Gamble*, 613 F.2d at 542; *Swint v. Pullman-Standard*, 624 F.2d at 530; *United States v. Georgia Power Co.*, 634 F.2d at 934; and *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d at 1116-17.

[16] *See* discussion below, pp. 23-24, n.6.

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose. *Id.* at 352, quoted above, p. 4.

a. ***Factor (1)—"Whether the Seniority System Operates to Discourage All Employees Equally From Transferring Between Seniority Units"***

The superficial similarity of the Fifth Circuit's "factor (1)" to the Supreme Court's observation that the seniority system in *Teamsters* "applies equally to all races and ethnic groups," hides an important shift in emphasis. Thus, the circuit court decides "whether the seniority system operates to discourage all employees equally" by computing whether *numerically more* minority employees than non-minority employees are "discouraged" from transferring. The Fifth Circuit apparently misconstrued this Court's observation, at 431 U.S., 357, that "the overwhelming majority [of "city drivers and servicemen who are discouraged from transferring to line-driver jobs"] are white." Thus, as the Fifth Circuit pointed out in *Georgia Power*:

> [U]nlike in *Teamsters* where those discouraged from transferring to line-driver jobs were not predominantly members of minority groups, 431 U.S. at 355-56, 97 S.Ct. at 1864-65, here, the overwhelming majority of employees discouraged by a total loss of seniority from transferring to the better-paying, more desirable jobs were black. In this way, the seniority system operated to "lock" black workers into inferior jobs. 634 F.2d at 935.

Therefore, the circuit court's analysis focuses upon numerical or proportional impact of the seniority system [17]

---

[17] *See, e.g., Swint v. Pullman-Standard*, 624 F.2d at 531 (court should consider "the fact that by locking blacks into the least remunerative departments the greater impact was felt by blacks than by whites."); *United States v. Georgia Power Co.*, 634 F.2d at 935 (in spite of a finding that "[a]ny employee transferring between seniority units . . . lost all seniority rights, regardless

(which is another way of measuring the system's "perpetuation quotient") and, as a result, renders irrelevant the Supreme Court's emphasis on *equality of application*.[18] This approach makes it virtually impossible for any neutral seniority system, which, in its routine application pereptuates the effects of an employer's pre-Act discrimination, to pass muster under "factor (1)."

The Fifth Circuit's application of "factor (1)" in the instant case (624 F.2d at 530-31) is relatively noncommittal. The court did not dispute the district court's findings that the seniority system is fair and neutral in its operation. The court did, however, take issue with the lower court's refusal, based on language in an earlier circuit court decision in this case, to "measure neutrality" without reference to the relative desirability of jobs.[19] In response, the circuit court stated that its ear-

---

of his race," the court found that this "facial (sic) equality . . . was but a mask for the gross inequality beneath." Since the numerical majority of those discouraged from transferring was black, "[i]t is . . . apparent that in discouraging transfers between seniority units, the seniority system did not operate equally on the races but had a disproportionately heavy negative impact on blacks."); *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d at 1119 ("The *disparate impact* of the . . . seniority system on black employees is obvious and well documented. . . . We have held that *disparate impact* constitutes not only relevant evidence of discriminatory purpose, *Swint*, but can conclusively resolve the 'equality' factor in favor of those who have suffered such discrimination. *See Georgia Power.*") (Emphasis added.) And *compare* the analysis of this issue by the district court in *Swint*, 17 FEP Cases 730, 733-34.

[18] *See Carroll v. United Steelworkers of America*, 498 F. Supp. 976, 986 (D. Md. 1980), wherein the court observed that conditioning a finding that a seniority system is equal in its application upon a preliminary showing that "most of the persons discouraged from transferring to other jobs were white . . . would distort the facts and analysis in *Teamsters*."

[19] The district court's discussion of this issue is as follows:

> By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could however attempt to measure the relative effect of the no-

lier holding "cannot reasonably be construed to preclude consideration of the *fact* that by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites." 624 F.2d at 531. emphasis added. Apparently, the court here implicitly assumed that there is a disparate impact on blacks with regard to the "lock-in" effect of the seniority system.

It must be observed, however, that the lock-in effect in this case (*i.e.*, seniority forfeiture on transfer and consequent inability to "catch-up" in new units) is the same as that described in *Teamsters* (*see* 431 U.S. at 344-345), and it was precisely this effect—"this continued, built-in disadvantage" (*id.* at 345)—which was attacked as a continuing violation of Title VII because it perpetuated the effects of past discrimination. As this Court made clear, however, such perpetuation does not invalidate an otherwise neutral bona fide seniority system nor does it support an inference that the system is discriminatorily motivated. Accordingly, to the degree that the Fifth Circuit in *Swint* relied upon a "disparate impact/perpetuation" theory in finding that the seniority system was unlawful, the court's application of a discredited legal standard constituted reversible error.

---

transfer rule on white and black employees, *i.e.*, to determine which group was the more discouraged from transferring. It may well be that a somewhat greater impact was felt by blacks than by whites, although . . . this conclusion is by no means certain. In any event, the rationale of the Fifth Circuit in Pullman-Standard II indicates that such a study of relative economic desirability would be inappropriate. If one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite—equality or neutrality—without reference to such desirability. Under this approach, it is clear that the pre-1972 no-transfer rule applied equally and uniformly to all employees, black and white, and that given the approximately equal number of employees of the two groups, it was quantitatively neutral as well. 17 FEP Cases at 734.

b. ***Factor (2)—"Whether the Seniority Units Are In the Same or Separate Bargaining Units (If the Latter, Whether That Structure Is Rational and In Conformance With Industry Practice)"***

The Fifth Circuit's wording and discussion of "factor (2)" in *James*, and the court's application of this factor in subsequent cases, show that the circuit court has misapprehended the point of this Court's observation that "[t]he placing the line drivers in a separate bargaining unit from other employees is rational in accord with industry practice, and consistent with National Labor Relations Board precedents." *Teamsters*, 431 U.S. at 356, footnote omitted. The Supreme Court was *not*, as the court of appeals contends in *James*, "discussing the relationship of seniority units to bargaining units" or suggesting that a different analysis should be applied depending upon "whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice)." *James*, 559 F. 2d at 352. Rather, the Court was observing that consistency with industry practice and Board precedent [20] added further support to its finding that the seniority system, wherein separate seniority units tracked separate bargaining units, was bona fide. But it should be clear that the Court does not view consistency with practice or precedent as a *prerequisite* to such a finding. In *California Brewers*, this Court emphasized that parties to collective bargaining in diverse circumstances will inevitably fashion a wide variety of seniority systems:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through col-

[20] Pursuant to authority granted in Section 9(b) of the National Labor Relations Act [29 U.S.C. § 159(b)], the NLRB determines units appropriate for collective bargaining. For a discussion of the factors considered by the Board in determining an appropriate unit, *see* Morris, Developing Labor Law 201, 217-22 (1971).

> lective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *United Steelworkers v. Weber*, 433 U.S. ——, 99 S.Ct. 2721, 61 L.Ed.2d 480. It does not behoove a court to second-guess either that process or its products. *Porter Co. v. NLRB*, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 69 S.Ct. 1287, 93 L.Ed. 1513. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S. at 355, n.41, 97 S.Ct. at 1865.[21]

If an employer and a union, attempting to address their special concerns, developed a unique but nondiscriminatory seniority system (*see, e.g., California Brewers*, 444

---

[21] *California Brewers, supra*, 444 U.S. at 608. The Court has long recognized that differing industrial circumstances and bargaining goals have given rise to a wide variety of seniority systems, including varying definitions of seniority units. *See Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526-27 (1949). Congressional deference to the rights secured by seniority systems has been recognized by the Court in a variety of contexts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employee's religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (a bona fide seniority system that perpetuates the effects the employer's past discrimination is nonetheless protected by § 703(h) of Title VII); *California Brewers Association v. Bryant*, —— U.S. ——, 100 S. Ct. 814 (1980) (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

U.S. at 602-604), there would be no basis for holding that system non-bona fide simply because it might differ from industry practice or be based upon "unprecedented" bargaining units.

The point must be stressed that a bargaining agreement's definition of seniority units is purposive and functional, generally reflecting a compromise between the union's goal of protecting and/or enhancing employees' status in proportion to length of service and the employer's goal of ensuring a stable, productive, safe and efficient workforce.[22] To the degree that the latter goal is sacrificed to the former, the interests of both employers and employees may suffer.[23] In this regard, it is significant that even collective bargaining agreements providing for *plant-wide* seniority (as opposed to departmental or occupational seniority) often provide that such seniority will be determinative only where other factors (*e.g.*, ability to perform the work and physical fitness) are relatively equal.[24] In an industrial setting, where special skills are most often acquired in specific departments or lines of progression, the practical effect of such ability/fitness requirements is that management is assured that an individual with relatively high plant seniority but lacking the requisite skills cannot "bump" or

---

[22] *See, e.g.*, the court's discussion of "Rationality of the Seniority Units" in *Carroll v. United Steelworkers of America, AFL-CIO-CLC*, 498 F. Supp. 976, 987-89 (D. Md. 1980).

[23] *See, e.g., Swint v. Pullman-Standard*, —— F. Supp. ——, 17 FEP Cases 730, 734, n.7 (N.D. Ala. 1978), wherein the court noted that the adoption of plant-wide seniority at one of Pullman's plants gave rise to problems which "contributed substantially to the ultimate closing of the plant for economic reasons."

[24] *See, e.g.*, the collective bargaining agreement of the United States Steel Corporation and the United Steelworkers of America, set forth in Collective Bargaining, Negotiations and Contracts, Vol. 1, Techniques and Trends; Current Settlements 29:34 (1980). While seniority is measured under this agreement on a plant-wide basis, "seniority shall be applied *in the seniority units* which may be an entire plant or any subdivision thereof, as established or agreed upon." *Id.*, emphasis supplied.

be promoted or transferred into a job where that person's inability to perform would jeopardize safety, efficiency or productivity. An incidental effect of this form of plant-wide seniority *may be* to perpetuate prior discriminatory job assignments to departments or lines of progression which do not provide the skills necessary to move into the "more desirable" jobs or departments. But as *Teamsters* made clear, such an incidental effect would in no way undermine the legality, rationality or the practical necessity of such requirements.

As is apparent in *James*, and subsequent Fifth Circuit seniority decisions, however, the court's "factor (2)" erroneously assumes that the Supreme Court viewed seniority systems which were not congruent with bargaining units as somehow suspect, requiring a more stringent analysis (*i.e.*, "whether that structure is rational and in conformance with industry practice.").[25]

Moreover, the court's application of its "factor (2)" in *Swint* (624 F. 2d at 531-32) suggests that the court gives little weight to facts demonstrating the rationality of bargaining units and/or seniority units.[26] Thus, rather

---

[25] *See, e.g., James*, 559 F.2d at 353 ("unlike the facts of *Teamsters*, here the seniority units do not reflect existing separate and distinct bargaining units that conform to industry practice."); *Swint*, 624 F.2d at 531-532 (the court found "arbitrary creation of departments by the company since unionization" and "individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice . . . indicative of attempts to maintain one-race departments," rejecting the district court's findings that "separation within the various units . . . was required by a specific decision of the N.L.R.B." and that the "departmentalization at Pullman-Standard [was] rational, in accordance with industry practice, and consistent with N.L.R.B. policies."); and *Georgia Power*, 634 F.2d at 936 ("there were no separate bargaining units and the 'black' seniority units were therefore part of the same bargaining unit as the 'white' seniority units. Any unequal treatment caused by the seniority system cannot be explained by or attributed to the division of bargaining units.").

[26] *Compare* the court's discussion of the "facts" (624 F.2d at 531-32) *with* the district court's findings (17 FEP Cases at 734-

than examining the rationality of seniority units, the Fifth Circuit has established what amounts to a *per se* rule, whereby seniority systems of less than plant-wide scope will almost inevitably fail to pass muster.[27]

In sum, the Fifth Circuit's "factor (2)" mistates the Supreme Court's point regarding the rationality of separate bargaining units, and, as applied by the court, is simply another way of finding that intent to discriminate may be inferred from the perpetuation, by a neutral seniority system, of the effects of past discrimination by the employer. It must, therefore, be repudiated as an attempt to revive a principle which was rejected by the Supreme Court in *Teamsters*.

---

37). The USW petition for certiorari discusses in detail the Union's view of the Fifth Circuit's "liberties" with the facts. *See* USW *cert. pet.* at 16-19.

Similarly, *compare* the court's discussion of "factor (2)" in *Georgia Power*, 634 F.2d at 935-36, *with* the district court's findings of fact regarding the operation of the seniority system, *U.S. v. Georgia Power Co.*, 3 EPD ¶ 8318, pp. 7077-78 (N.D. Ga. 1971).

[27] The court has made its bias in favor of plant-wide seniority most clear in *Terrell*, where the court held that a union could escape liability with regard to a unit seniority system held unlawful under a *James/Swint/Georgia Power* rationale only if the union actively had sought, albeit unsuccessfully, to negotiate a *plant-wide* seniority system. *See*, 644 F.2d at 1120-1121. The court in *Terrell* also referred to the *Georgia Power* and *Swint* decisions as containing "descriptions of the discriminatory operation of seniority systems with 'lock-in' provisions." *Id.* at 1115.

Of the three post-*Teamsters* decisions in which the Fifth Circuit has held seniority systems *protected* by § 703(h), one involved a *plant-wide* (as opposed to a departmental) system [*Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 542 (1980)]; one affirmed a district court's dismissal of plaintiffs' case as "frivolous" and "without merit" where plaintiffs adduced no evidence to support their claims of discrimination vis-a-vis the seniority system [*Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (1980)]; and one, without mentioning the *James* decision, held that a seniority system is protected by § 703(h) unless discriminatory purpose is *shown* [*Southbridge Plastics, supra*, n.13].

c. *Factors (3) and (4)—"Whether the Seniority System Had Its Genesis In Racial Discrimination" and "Whether the System Was Negotiated and Has Been Maintained Free From Any Illegal Purpose"*

"Factors (3) and (4)" in the Fifth Circuit's analysis derive from the court's separation of two clauses[28] in the Supreme Court's observation in *Teamsters*, "[i]t is conceded that the seniority system did not have its genesis in racial discrimination and that it was negotiated and has been maintained free from any illegal purpose."[29] *Teamsters*, 431 U.S., at 356. In evaluating the

---

[28] The confusion generated by this arbitrary separation and apotheosis is reflected in the district court's attempts in *Swint* to apply these "factors" in a logically consistent manner. *See* 17 FEP Cases, 737-39. The cited pages also demonstrate the interrelation of this Court's observations, and buttress our contention that the Court did not intend that its words be viewed as a test. Thus, as the district court observed, "facts already discussed" (*i.e.*, with regard to the first three factors) make it clear that the "seniority system was negotiated and maintained free from any discriminatory purpose." *Id.* at 739. More specifically, a system which did not have its genesis in racial discrimination is one which was negotiated free from illegal purpose, and one that "applies equally to all races and ethnic groups" has been "maintained" on a nondiscriminatory basis.

[29] In view of this Court's reversal, in *Teamsters*, of the line of cases holding that a violation of Title VII may be found, and discriminatory intent inferred, from the mere perpetuation of the effects of an employer's past discrimination, no plaintiff will ever again "concede" that a "seniority system did not have its genesis in racial discrimination," or that the system was negotiated and maintained "free from any illegal purpose." *See, e.g., James*, 559 F.2d at 352 ("There is no such concession here. The seniority system at Stockham was adopted in a collective bargaining agreement in 1949, when segregation in the South was standing operating procedure.")

It is reasonable to assume that the "concession" in *Teamsters* was made on the bases of the neutral operation of the system, and of evidence, submitted by the parties to the collective bargaining agreement, that discriminatory intent did not enter into the adoption of the seniority system there. In *Swint*, and in most of the other post-*Teamsters* Fifth Circuit seniority cases, the same situation obtains. Evidence produced by the parties to the collective

bona fides of the seniority system, there can be no doubt that these "factors," *if* applied in a manner that is consistent with the Court's decision in *Teamsters*, would be determinative. Thus, if the seniority system had its "genesis in discrimination" in the sense that "an intent to discriminate entered into its very adoption" (*Teamsters*, 431 U.S. at 346, n.28), the system may not be bona fide.[30] Similarly, if discriminatory *purpose* were shown to have entered into the negotiation (*i.e.*, "genesis") or maintenance (*i.e.*, administration and/or renegotiation) of the seniority system, the seniority system might not be protected by § 703(h).

In its application of "factors (3) and (4)," however, the Fifth Circuit has not focused on evidence of discriminatory intent in the negotiation or maintenance of the seniority systems.[31] Rather, the court has viewed "genesis" not as a "causative" concept, but as pertaining to the *time* of negotiation, and has inferred the existence of discriminatory purpose if a departmental or occupational seniority system was negotiated at a time when discrimination was practiced by the employer and in the surrounding community, and if the seniority system perpetuates the effects of the employer's discriminatory

---

bargaining agreement reveals no *intent* to discriminate entering into the adoption of the seniority system, which is applied equally to all employees. (*See* n.31 below.) The plaintiffs were not, apparently, present at the negotiations, and they advance no evidence to suggest that discriminatory intent was involved. Plaintiffs do not, however, *concede* the absence of discriminatory intent (since such a concession would result in dismissal of their case).

[30] *See* discussion, *supra*, at n.8.

[31] In fact, in this case and others, the court has failed to reconcile its holdings with evidence or lower court findings that there was *no* such intent. *Compare, e.g., Swint*, 17 FEP Cases, 737-39, *with* 624 F.2d 532-33; and *compare Georgia Power*, 634 F.2d at 936-37 *with U.S. v. Georgia Power Co.*, 470 F. Supp. 649, 652 (N.D. Ga. 1979) and 3 EPD ¶ 8318 at 7093 (N.D. Ga. 1971).

hiring or assignment policies.[32] In the instant case, the circuit court cited no evidence of discriminatory intent on the part of the USW, but found that the seniority system failed to pass muster under "factors (3) and (4)" based primarily upon contemporaneous discrimination by the employer and by another union *not* a party to the collective bargaining agreement between the USW and the employer. 624 F.2d at 533.

As discussed above, the circuit court in *Swint* left undisturbed the district court's "factor (1)" findings that the seniority system is neutral on its face and as applied. Thus, other than perpetuating the effects of the employer's past discrimination, the *maintenance* of the seniority system had no adverse impact on black employees. Contrary to logic and common sense, the court appears to be holding that, aside from an effect which this Court has held to be protected by § 703(h), the administration of a neutral seniority system in a neutral fashion suggests discriminatory motivation. Moreover, beyond the court's inference drawn from "contemporaneous events" (and in spite of district court findings and substantial evidence to the effect that the USW, even in Alabama in 1941, was a *non*-discriminatory institution),[33] the cir-

---

[32] *See, e.g., James*, 559 F.2d at 352 ("The seniority system . . . was adopted in a collective bargaining agreement in 1949 when segregation in the South was standing (sic) operating procedure."); *Swint*, 624 F.2d at 532-33 (court relies upon discrimination in the community, by the employer and by the I.A.M.); *Georgia Power*, 634 F.2d at 936 ("the seniority system had its genesis in an era of overt racial discrimination."); *Terrell*, 644 F.2d at 1118 ("the system arose in an era of overt racial discrimination.").

[33] *See* 17 FEP Cases at 738; and *compare Terrell*, 644 F.2d 1112. The facts of *Terrell* show that the USW began its organizational efforts at the United States Pipe facility in Bessemer, Alabama (the location of the Pullman-Standard facility in *Swint*) in 1939. *Id.* at 1115. As in *Swint*, NLRB elections resulted in representation of employees in various crafts by various unions, with the USW representing the remaining employees, in *Terrell* a "predominately-black group." *Id.* at 1116. As in *Teamsters*, the seniority system in *Terrell* was generally based upon seniority within the bargaining units. *Id.* at 1115. After 1968, the USW consistently

cuit court cited no *evidence* contradicting the district court's extensive factual findings, under "factors (3) and (4)," exonerating the USW.[34]

As is apparent, the circuit court's application of its "factors (3) and (4)" bears no relation to the passage from *Teamsters* which is the purported source of those factors. Thus, in the absence of evidence of discriminatory intent (or in the face of evidence to the contrary), the Fifth Circuit will infer such intent from the negotiation and administration of a neutral seniority system that perpetuates an employer's past discrimination if, at the time of negotiation, there was prevalent racial discrimination by the employer and in the surrounding community.[35] Like the other "factors," "(3) and (4)" repre-

---

proposed plant-wide seniority, but this was resisted by the other unions. Primarily on the basis of the USW's pursuit of plant-wide seniority, the Fifth Circuit in *Terrell* excused the union from liability under Title VII. Of particular interest is the following passage:

> The district court found that the evidence in this case supported the general observation that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." The United Steelworkers of America has a well-known history of striving to achieve racial equality and integration in the labor movement. *Id.* at 1121.

Inasmuch as the district court in *Swint* made an identical finding, that the "USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation" (17 FEP Cases at 738), the failure of Judge Hatchett, who wrote the Fifth Circuit's opinions in both *Swint* and *Terrell*, to give equal weight to *these* "contemporaneous events" is somewhat puzzling. The only explanation seems to be that in *Swint*, the USW negotiators bargained for and obtained a departmental seniority system. But also ignored by the Fifth Circuit was the district court's findings here that the departmental system administered by the USW was a major cause of the elimination of segregation at Pullman-Standard even *before* the enactment of Title VII. 17 FEP Cases at 738.

[34] *See* 17 FEP Cases at 737-39.

[35] Not only is the Fifth Circuit's standard legally impermissible, it is logically circular. A neutral seniority system would have no

sent a veiled return to the mode of analysis used by the Fifth Circuit prior to *Teamsters* but rejected by the Supreme Court in that case.

The Fifth Circuit's attitude in this regard is at odds with the Supreme Court's oft-expressed reluctance to modify a collectively-bargained seniority system, or even to find such a system unlawful. As the Court emphasized in *Teamsters*, "Post-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* . . . without attacking the legality of the seniority system as applied to them." 431 U.S. at 347. This is because, in a "perpetuation" case, the "underlying legal wrong . . . is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." *Franks v. Bowman Transp. Co., supra*, 424 U.S. 747, 758 (1976). The fact that the relief available to discriminatees would not be enlarged by holding unlawful a seniority system that perpetuated the effects of the employer's post-Act discrimination is, as the Court has stated, "simply an additional reason not to hold the seniority system unlawful." *Teamsters*, 431 U.S. at 348, n.30.

It was obviously for this reason that the Court in *Teamsters* cast the issue of the system's legality in terms of the relief available: "We must decide, in short, whether § 703(h) validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII. . . ." *Id.*, 431 U.S., at 348. The Court's reluctance to invalidate seniority systems simply reflects the Con-

---

discrimination to perpetuate unless the employer had discriminated in the past. Such employer discrimination, especially in the South before the passage of the Act, could be assumed to reflect community attitudes and practices. It is thus difficult to imagine a situation in which the discrimination perpetuated by the routine application of a neutral seniority system did *not* arise at a time when such discrimination was prevalent in the community or by the employers in the community.

gressional policy, expressed in § 703(h), that seniority rights vested under a bona fide seniority system were not to be disturbed.

CONCLUSION

Contrary to the Congressional goal of protecting employee rights vested under bona fide seniority systems, the Fifth Circuit's test, as applied by the court below in this case and in other cases, invalidates such systems based upon an impermissible inference that discriminatory intent is inherent in any neutral seniority system that perpetuates the effects of an employer's past discrimination. This Court has already held that such perpetuation will not sustain a finding that an otherwise neutral system is unlawful and has emphasized the impropriety of invalidating or modifying seniority systems that do not embody purposeful discrimination. The Fifth Circuit's application of its "four factor" analysis returns the law of that circuit to its pre-*Teamsters* principles and renders vulnerable any less-than-plant-wide seniority system negotiated within the circuit's boundaries prior to the effective date of the Act. This Court should, therefore, reject the Fifth Circuit's approach and make it clear that a neutral seniority system is bona fide within the meaning of § 703(h) unless it is demonstrated that intent to discriminate entered into the system's negotiation and maintenance.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
DAVID H. LARRY
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae

July 17, 1981

Nos. 80-1190 and 80-1193

In the Supreme Court of the United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
OCT 23 1981
ALEXANDER L. STEVAS,
CLERK

PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC., PETITIONER

v.

LOUIS SWINT AND WILLIE JOHNSON, ETC.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

LOUIS SWINT AND WILLIE JAMES JOHNSON

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

REX E. LEE
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
DAVID A. STRAUSS
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
MARIE E. KLIMESZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CONSTANCE L. DUPRE
Acting General Counsel
PHILIP B. SKLOVER
Acting Associate General Counsel
VELLA M. FINK
Assistant General Counsel
SUSAN BUCKINGHAM REILLY
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTIONS PRESENTED

1. Whether the court of appeals applied proper criteria in determining that aspects of the seniority system in effect at Pullman-Standard's plant were not bona fide within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

2. Whether the court of appeals complied with Fed. R. Civ. P. 52(a) in reviewing the district court's findings.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. The court of appeals correctly determined that aspects of petitioners' seniority system were not bona fide	9
II. The test applied by the courts below identifies proper criteria for determining whether a seniority system is bona fide	17
A. Disproportionate impact	18
B. A history of discrimination	23
C. Business justification	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405	18, 25
Black & Decker Manufacturing Co., 147 N.L.R.B. 825	16
Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768	27, 28
California Brewers Association v. *Bryant*, 444 U.S. 598	10
Columbus Board of Education v. *Penick*, 443 U.S. 449	24
County of Washington v. *Gunther*, No. 80-429 (June 8, 1981)	18
Dayton Board of Education v. *Brinkman*, 443 U.S. 526	12
East v. *Romine, Inc.*, 518 F.2d 332	13
Dothard v. *Rawlinson*, 433 U.S. 321	18
Franks v. *Bowman Transportation Co.*, 424 U.S. 747	15, 22

Cases—Continued

	Page
Furnco Construction Corp. v. *Waters*, 438 U.S. 567	22
General Electric Co. v. *Gilbert*, 429 U.S. 125	19
Georgia Highway Express, 150 N.L.R.B. 1649	29
Globe Machine & Stamping Co., 3 N.L.R.B. 294	29-30
Gomillion v. *Lightfoot*, 364 U.S. 339	21
Griggs v. *Duke Power Co.*, 401 U.S. 429	18
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324	4, 15, 16, 18, 19, 29
James v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, cert. denied, 434 U.S. 1034	4, 26
Keyes v. *School District No. 1*, 413 U.S. 189	24
Mallinckrodt Chemical Works, 162 N.L.R.B. 387	29
McGinnis v. *Royster*, 410 U.S. 263	23
Miller v. *Continental Can Co.*, 26 Fair Empl. Prac. Cas. 151	20, 21
Myers v. *Gilman Paper Co.*, 25 Fair Empl. Prac. Cas. 468	20
NLRB v. *Chicago Health & Tennis Clubs*, 567 F.2d 331	16
Parke Davis & Co., 173 N.L.R.B. 313	29
Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256	19, 21
Sears v. *Bennett*, 645 F.2d 1365, petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221	17, 27
Terrell v. *United States Pipe & Foundry Co.*, 644 F.2d 1112	17, 25-26, 28-29, 30
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63	15
United States v. *Board of School Commissioners*, 573 F.2d 400, cert. denied, 439 U.S. 824	19
United States v. *General Motors Corp.*, 384 U.S. 127	12
United States v. *Georgia Power Co.*, 634 F.2d 929, petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117	2, 17, 20
United States v. *United States Gypsum Co.*, 333 U.S. 364	13
United States Pipe & Foundry Co.:	
19 N.L.R.B. 1016	30
84 N.L.R.B. 954	30

Cases—Continued Page

United Steelworkers of America v. *Weber*, 443 U.S. 193 ..... 12, 28
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252..12, 19, 21, 22, 23
Washington v. *Davis*, 426 U.S. 229 21
Wheeler-Van Label Co. v. *NLRB*, 408 U.S. 613, cert. denied, 396 U.S. 834 16

Constitution, statutes and rules:

United States Constitution, Fourteenth Amendment (Equal Protection Clause) 23
Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. III) 2000e *et seq.* 1, 2, 7
Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1).. 18
Section 703(h), 42 U.S.C. 2000e-2(h).....1, 4, 7, 8, 9, 10, 11, 15, 17, 18, 19
Fed. R. Civ. P. 52 12
Fed. R. Evid. 404(b) 24

Miscellaneous:

110 Cong. Reg. 7243 (1964) 15

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1190

PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC., PETITIONER

v.

LOUIS SWINT AND WILLIE JOHNSON, ETC.

No. 80-1193

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

LOUIS SWINT AND WILLIE JAMES JOHNSON

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission and the Attorney General have primary responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.* Under recent decisions of this Court, Section 703(h) of the Act, 42 U.S.C. 2000e-2(h) protects certain bona fide seniority systems from attack under Title VII. This case concerns the definition of "bona fide" for purposes of Section 703(h) and is therefore of substantial significance to the enforcement of Title VII. Several other cases presenting similar issues, in which the United States or the Equal Employment Opportunity Commission are parties or were amici below, either are before the Court or may be before

the Court shortly. See, *e.g.*, *United States* v. *Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; *Sears* v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981), petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221; *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981).

STATEMENT

Respondents, black employees of petitioner Pullman-Standard, brought this action in 1971 in the United States District Court for the Northern District of Alabama. They charged that petitioner Pullman-Standard and petitioners United Steelworkers of America and its Local 1466 (USW) had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 1a-2a).[1] Respondents alleged, among other things, that the seniority system at Pullman-Standard's Bessemer, Alabama plant violated Title VII. The International Association of Machinists (IAM) was subsequently added as a defendant for purposes of injunctive relief (see J.A. 14-16, 29).

1. At the time the Bessemer plant was unionized, in 1941, there were approximately 20 operational departments, of which four were all-white and one was all-black (see J.A. 103). Each department comprised one or more jobs; jobs were segregated by race (see Pet. App. 39a). Job segregation continued past the effective date of Title VII (*id.* at 8a). Many other aspects of the organization of the plant reflected racial classifications and racial segregation (Pet. App. 39a; see page 6 & note 4, *infra*).

In 1941, the IAM sought to organize a craft unit within the plant, while a predecessor of the USW sought to represent all production and maintenance workers.[2]

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 80-1193.

[2] Other unions also made efforts to organize the plant, and the International Brotherhood of Electrical Workers represented a unit within the plant until 1946 (Pet. App. 36a, 41a).

After an election, the National Labor Relations Board certified the IAM to represent a unit similar, but not identical, to the unit which the IAM sought to represent. In particular, the IAM was designated to represent employees in the all-black Truck Department—which it had not sought to include in its unit—apparently because management testified before the NLRB that the Truck Department was functionally related to certain machinists' jobs (see J.A. 166, 130-131). The USW represented most of the other employees in the plant. The bargaining units sought by the IAM and designated by the NLRB required that certain departments be divided; for example, there were an IAM Die and Tool Department and a USW Die and Tool Department. The IAM Department consisted of all the white die and tool jobs; the USW Die and Tool Department was all black, except for one white. Similarly, the IAM unit split off all-white components from the Maintenance and Steel Erection Departments, which had been integrated. See Pet. App. 35a; J.A. 165-166, 167, 170-171, 243-251.

Shortly after the units were certified, the IAM and the USW, with the agreement of Pullman-Standard, exchanged certain job classifications. The IAM ceded all the jobs in its unit staffed by blacks to the USW; the USW ceded two jobs staffed by whites to the IAM. The result of this exchange was that the IAM's bargaining unit became all-white (see Pet. App. 12a, 41a-42a; J.A. 339-340; USW Br. 7a n.2). Several aspects of the seniority system that were determined by the 1941 certification and exchanges persisted at least until the time this suit was brought (see Pet. App. 118a n.5, 123a (IAM Maintenance (Millwrights), Truck, and IAM Die and Tool Departments)).

Seniority governed layoffs and recalls at all relevant times. From 1942 until 1947 and from 1954 until the Bessemer plant permanently closed in 1981, the USW collective bargaining agreement provided that seniority would be measured by the number of years an employee had been in a department (Pet. App. 40a-41a; J.A. 192,

194).[3] The USW agreements always provided that an employee forfeited his seniority when he voluntarily transferred from one seniority unit to another (Pet. App. 26a).

2. In 1974, the district court held that the seniority system did not violate Title VII (Pet. App. 138a). In 1976 the Fifth Circuit reversed (*id.* at 75a). While the case was pending before the district court on remand, this Court decided *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), holding that under Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-(2)(h), certain bona fide seniority systems did not violate Title VII even though they perpetuated the effects of past discrimination. The district court then ruled, after a brief hearing, that the Bessemer seniority system was bona fide and therefore did not violate Title VII (Pet. App. 23a-44a).

The district court took the position that only "the bona fides of the seniority system * * * between the company and the USW" were "under attack" (Pet. App. 35a); the IAM "seniority unit[]," it said, was "not directly at issue in this litigation" (*id.* at 26a & n.2). To determine whether the USW seniority system was bona fide the court considered (*id.* at 28a) the factors identified in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978):

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

---

[3] From 1944 until 1981, the IAM agreement provided for occupational seniority (Pet. App. 26a-27a).

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose.

The district court concluded that the USW system satisfied the first *James* factor because it was "facially neutral"; moreover, the rules basing seniority on time in a department and providing for forfeiture upon transfer were "applied equally to all races" (Pet. App. 28a). The court stated that these rules "affect[ed] significant numbers of both white and black employees * * * in an identical manner" (*id.* at 29a). The district court expressly declined to determine whether black employees were confined to less desirable departments than whites (*id.* at 29a-30a).

The court construed the second *James* factor to mandate an inquiry "into rationality and industry practice" (Pet. App. 31a). The court compared the Bessemer system to seniority systems at other plants that manufactured railroad equipment, including two Pullman-Standard plants at which there were few blacks. It noted several instances in which single integrated departments in the other plants were divided into two segregated or nearly segregated departments at Bessemer, but explained that in almost every case the departments were divided in this way because the plant had been divided into separate bargaining units (*id.* at 34a-37a & n.19). The respondents' contention that certain departments should not have been divided when the bargaining unit was certified was characterized by the court as a "collateral attack on the NLRB decision * * * [that] must fail" (*id.* at 36a). The court added that because the USW had sought to include all the employees in its bargaining unit, and because Pullman-Standard had "adopted a 'hands-off' attitude on formulation of election units" (*id.* at 35a-36a), neither was "chargeable with responsibility" for the divided departments (*id.* at 37a). The court concluded that, taken as a whole, the

seniority units at Bessemer were rational and consistent with industry practice (*id.* at 32a, 37a-38a).

In discussing the genesis of the seniority system, the court found that discrimination was "pervasive[]" and "racial segregation was extensively practiced at the company's Bessemer plant, in the local union hall, and in the community as a whole" (Pet. App. 39a).[4] But the court ruled that "the seniority system under attack is essentially the product of USW aims and policies" (*id.* at 40a) and that the USW local, "[w]hile possessing some of the trappings taken from an otherwise segregated society * * * was one of the few institutions in the area which did not * * * serve[] the cause of segregation; rather, it served a joint interest of black and white workers" (*ibid.*; footnote omitted). The court also pointed to the significant number of blacks in the leadership and rank-and-file of the USW (see *id.* at 34a n.14, 43a).

The court expressly declined to make a finding on the motives of the IAM (Pet. App. 42a) because, it said, "[t]he predecessor of the USW sought to represent all workers, black and white, in the plant" and therefore "the USW cannot be charged with racial bias in its response to the IAM situation" (*ibid.*). The court also found, without elaboration, that Pullman-Standard had bargained without racial animus (*id.* at 43a).

The court considered the fourth *James* factor to be a composite of the others and concluded that "the system

---

[4] The court further explained (Pet. App. 39a):

> Most of the jobs at the plant were by custom treated as "white only" or "black only" * * *. Bathhouses, locker rooms, and toilet facilities were racially segregated. Company records—including employee rosters, internal correspondence, records of negotiation sessions, lists of persons picketing—included racial designations. In 1941 some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated.

under attack" was bona fide and therefore within the Section 703(h) exemption (Pet. App. 43a-44a).

3. The court of appeals, also invoking *James*, reversed. It emphasized the segregated departments that were created at the Bessemer plant—many of which had no counterparts in other Pullman-Standard plants (Pet. App. 11a, 12a). These departments, the court concluded, were "arbitrary creation[s]" supported by "no other considerations than the objective to separate the races"; they were, the court said, the result of the IAM's "obvious principal aim * * * to exclude black workers from its bargaining unit" (*id.* at 11a-15a). The court repeated the district court's account of both the pervasive discrimination that prevailed when the system was established and the USW's relative insulation from it, but criticized the district court for ignoring the IAM's motives (*id.* at 13a-14a, 14a-15a). It pointed to the IAM's "maneuvers," in which Pullman-Standard and the USW acquiesced, designed to bar blacks from its bargaining unit (*id.* at 15a-16a). "[T]he I.A.M. manifested an intent * * * selectively [to] exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding" (*id.* at 14a), both at and after the time the plant was organized (see *id.* at 11a). Finally, the court noted that blacks were confined to the less remunerative seniority departments (*id.* at 10a, 14a). The court concluded that it was compelled to "reject[] the district court's finding that * * * the seniority system at Pullman-Standard is 'bona fide' within the meaning of § 703(h) * * *" (*id.* at 21a-22a). It ordered that the case be "remand[ed] to the district court for proceedings necessary to provide appropriate relief" (*ibid.*).

SUMMARY OF ARGUMENT

I. The court of appeals correctly determined that at the initiative of the IAM, certain aspects of the Bessemer plant's seniority system were designed to achieve racially segregative consequences, and were therefore not bona fide. For the most part, the court of appeals did

not specifically address the other aspects of the system, although its opinion can be read as proceeding on the erroneous premise that if certain aspects of a system are not bona fide no aspect of the system is protected by Section 703(h). This Court should consider the definition of "bona fide" only in the context presented by those aspects of the system that were affected by the IAM's maneuvers.

The court's determination that racial considerations affected certain aspects of the departmental arrangements was based essentially on documentary evidence that permitted no other conclusion, and was clearly correct. The district court's reliance on NLRB designation of the bargaining units misapprehends the Board's role and the significance of such a designation. That the IAM, as opposed to petitioners, may have been principally responsible for injecting the racial element may be relevant to fashioning relief, but it has no bearing on the question whether certain aspects of the system are not bona fide. That question is answered by the conclusion that race affected the design of the system, and that that design persisted past the effective date of Title VII.

II. Both the district court and the court of appeals applied, in effect, three criteria in assessing the bona fides of the seniority system. They considered whether the challenged aspects of the system had a disproportionate effect on minority employees; whether those who established the system had a history of engaging in racial discrimination; and whether there was a business justification for the challenged aspects. These are proper criteria to apply.

A. A disproportionate impact can support an inference that an aspect of a seniority system was influenced by considerations of race. Because the practice of segregating jobs was so prevalent, job classifications provided a ready surrogate for racial classifications; parties intending to discriminate could therefore avoid explicit racial classifications by treating blacks' jobs differently from whites' jobs. Thus the differences between the impact of a seniority system on blacks' jobs and its impact

on whites' jobs will often be the principal evidence of a covert racial classification.

B. A party's history of racial discrimination can also support the inference that aspects of a seniority system designed or supported by that party have a discriminatory purpose. If an employer or union consistently discriminates in other areas, such as hiring, transfer, or membership rules, there is no reason to presume that its contemporaneous support for seniority rules that severely disadvantage blacks is nondiscriminatory and undertaken for legitimate purposes. Moreover, where one party to a collective bargaining arrangement has a discriminatory purpose, the other party need not join in it; it is sufficient that the other party does not resist it or make concessions in an effort to obtain minority employees' freedom from discrimination, because that permits the discriminatory purpose to operate without hindrance.

C. A sufficient business justification can show that a feature of a seniority system is bona fide. Because it will often be difficult for a court fruitfully to inquire into the particular needs of the single plant in issue, it must sometimes consider industry practice. Industry practice, even where reflected in NLRB precedents, may, however, itself be affected by race, and must therefore be used with care. In this case, a comparison to the appropriate industry practices supported the court of appeals' holding that certain aspects of the seniority system were not bona fide.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT ASPECTS OF PETITIONERS' SENIORITY SYSTEM WERE NOT BONA FIDE

1. Petitioners, and to some extent respondents and the court of appeals as well, seem to proceed from the premise that a seniority system is either entirely bona fide or entirely unprotected by Section 703(h). In fact certain aspects of a seniority system may be bona fide while others are not. See *California Brewers Associa-*

tion v. *Bryant*, 444 U.S. 598, 610-611 (1980); see also *id.* at 607-608. For example, use of seniority as a criterion may be legitimate, but the particular seniority units may be determined on the basis of race; or some seniority units may be racially gerrymandered while others reflect proper business concerns.

Here, the court of appeals' analysis centered almost entirely on the IAM's role in affecting the design of certain departments. See, *e.g.*, Pet. App. 13a-14a (IAM's motives show that system originated in racial discrimination); *id.* at 14a, 15a-16a (IAM's discriminatory maneuvers created certain segregated departments); *id.* at 15a ("An analysis of the totality of the facts and circumstances * * * leaves us with * * * no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached * * *."). The court found (*id.* at 15a-16a) that the IAM, to achieve its segregative purposes, brought about the gerrymandering of several departments at the Bessemer plant. The opinion appears to require that, on remand, the district court should remedy the effects of those features of the system which were attributable to the IAM's discriminatory actions.

Other aspects of the seniority system, however, may require no remedy. For example, the court's reasoning is entirely consistent with the position that Section 703(h) protected the operation of the Bessemer seniority system in certain departments that undoubtedly belonged in the USW unit, that served legitimate business objectives, that had close counterparts in other plants where race could not have been a factor, and that were unaffected by the IAM's maneuvers.

Certain passages in the court of appeals' opinion do suggest that the court intended to declare that no aspect of the seniority system was bona fide. Because the court's reasoning does not extend that far, however, we believe there is a basis for this Court to read the court of appeals' opinion narrowly, to hold only that certain

aspects of the system—those affected by the IAM's racially-motivated maneuvers—were not bona fide. We believe this holding is correct. To the extent that the court of appeals' holding may be read more broadly, however, we submit that this Court should recognize that it appears to be premised on the erroneous view that a seniority system is either entirely bona fide or entirely unprotected by Section 703(h). In particular, we believe this Court should not view the court of appeals' decision as a considered evaluation of the bona fides of each aspect of the Bessemer plant's seniority system. The Court should consider the question presented by this case—wh.n an aspect of a seniority system is bona fide under Section 703(h)—only in the context specifically addressed by the court of appeals; as we show in point II of this brief, pages 17-29, *infra*, the particular facts of a case may substantially affect the proper resolution of this issue. Therefore, in this case, we believe the Court should examine the criteria for determining when an aspect of a seniority system is bona fide only in the factual context presented by the IAM's maneuvers, and not in the context presented by the other aspects of the Bessemer plant's system.

2. The court of appeals was correct in determining that the IAM caused certain aspects of the seniority system to be based on race. It was also correct in holding that to the extent the system was affected by the IAM's discriminatory maneuvers, it was not protected by Section 703(h).

a. In 1941, the IAM first claimed a bargaining unit that appears to have included few or no blacks.[5] The NLRB believed that certain jobs held by blacks should be included in the unit, and designated a unit that con-

---

[5] Petitioners emphasize the IAM's announcement at the NLRB hearing that it would "claim" "negro cranemen" in the Die and Tool and Wheel and Axle Departments (J.A. 149), but there were no black cranemen in those departments (see J.A. 247, 249).

tained several blacks. The IAM then ceded the blacks' jobs to the USW, making the IAM unit all white. These facts alone suggest that the IAM's actions were racially motivated.

In addition, the court of appeals had before it the IAM's "ritual," in effect until 1948, which limited membership to "qualified white candidates" (J.A. 348, 350), and the established history of racial discrimination by craft unions, of which the court could take judicial notice (see *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 198 n.1 (1979)). Moreover, there was evidence that the IAM sought to include in its unit white employees who did not hold skilled jobs (see J.A. 292; see also Resp. Br. 27-29 nn. 32-33); this undermined the IAM's claim that it was excluding the black workers only because of the nature of their jobs.

It appears that all of this evidence was documentary; the court of appeals therefore did not need to make credibility determinations in order to evaluate the IAM's reasons for manipulating the boundaries of its bargaining unit. See generally *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-142 n.16 (1966). The district court had not made a contrary determination but simply declined to address the question. The court of appeals, upon examining the documentary evidence, saw "a clear pattern, unexplainable on grounds other than race" (*Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)), and accordingly had no reason to order a further remand on this issue. See *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534-535 n.8 (1979).[6]

---

[6] The Court granted certiorari on the question whether the court of appeals was bound by the "clearly erroneous" standard of Fed. R. Civ. P. 52 in reviewing the district court's determination that the Bessemer seniority system was bona fide. While we are disposed to agree with much that respondents say about this issue (see Resp. Br. 136-151), we believe that the question is not properly presented by this case. At no point did the court of appeals explicitly apply a standard other than the "clearly erroneous" rule to the district court's conclusions. To the contrary, the central passage

b. The district court refused to consider the IAM's motives because, it said, the IAM was not a "real defendant," the IAM "system" was not "under attack," and the USW and Pullman-Standard were "not chargeable with responsibility for" what the IAM did (Pet. App. 35a, 36a, 37a); petitioners endorse this position.[7] These

---

in its analysis of the district court's opinion recites (Pet. App. 15a):

> Having carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is "bona fide" within the meaning of section 703(h) of Title VII, we reject the district court's finding.
>
> An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made.

The "definite and firm conviction" standard is, of course, a restatement of the clearly erroneous rule. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). At other points, where the court of appeals questioned the district court's most significant conclusions, it applied a standard that at least satisfied the clearly erroneous rule. See, *e.g.*, Pet. App. 9a ("[W]e are not satisfied that the court's ultimate conclusion is amply supported by the record evidence."); *id.* at 14a ("It is crystal clear that considerations of race permeated the negotiation and adoption of the seniority system * * *."); *id.* at 15a ("There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose."); *id.* at 16a ("No credible explanation has been advanced * * *."). In any event, the court of appeals' principal difference with the district court was over the legal question whether the IAM's motives were relevant at all. See *id.* at 13a-14a, 16a.

The court of appeals' only reference to a power to overturn district court findings occurs in the second paragraph of an abstract discussion in a footnote (Pet. App. 15a n.6) where the court merely cites *East* v. *Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975), a decision discussing this power, and then quotes a passage from that opinion. Petitioners seize on this passing reference (see, *e.g.*, USW Br. 26, 27, 31) to make the unwarranted assertion that the court of appeals claimed and exercised such a power without regard to the clearly erroneous standard.

[7] Petitioners insist (*e.g.*, USW Br. 23 n.38; 47-48; Pullman Br. 3) that the court of appeals was barred from considering the IAM's motives because respondents' pleadings put at issue only the

arguments misconceive the issue. The question before the court of appeals was whether, and to what extent, the seniority system at the Bessemer plant was bona fide. To the extent that racial considerations entered into the design of the seniority units, the system was not bona fide; Congress did not intend Section 703(h) to protect rules of a seniority system that were adopted not for some legitimate reason but in order to segregate the

---

USW seniority system. The district court apparently shared this view (*e.g.*, Pet. App. 26a, 35a). The court of appeals, however, was not concerned about the internal operation of the IAM unit; the basis of its holding was that racial considerations caused certain jobs to be shifted from the IAM unit to the USW unit. There is no reason why the contention that jobs were shifted from one unit to another for impermissible reasons can be raised only as a claim about the IAM system and is not comprehended in a claim about the USW system. Moreover, respondents added the IAM as a defendant (although not seeking damages from the IAM, apparently because they had not met the administrative requirements for seeking damages; see Pet. App. 68a n.4) because "the relief requested may involve or infringe upon the provisions of [the IAM's] collective bargaining agreement with the Company" (J.A. 29). The IAM, which was represented by counsel for the USW (J.A. 41), answered, denying that it had discriminated against "any * * * black employee of Pullman-Standard" (J.A. 27). In addition, the court of appeals' first remand instructed the district court to consider whether blacks were systemically excluded from the IAM unit (Pet. App. 96a).

Petitioners also suggest (see USW Br. 7a n.2) that no black employees were prejudiced by the discriminatory shift of certain jobs from the IAM unit to the USW unit because the IAM used occupational seniority. In fact, the record appears to show that while employees transferring into the IAM unit forfeited all their seniority, employees transferring between jobs within the IAM unit retained their seniority in their old jobs; they merely did not carry it over to the new job. See J.A. 167-168; 172-173; 177-179 (no provision for forfeiture); Plaintiff's Exhs. 2, 3, 7, and 8 (entries for Norred, McBrayer, Luke, Ellis, Waltz, Parham, and Bullock). If such an employee were laid off from his new job, he apparently would be able to return to his old job with his previous seniority. Thus the record indicates that black employees who wished to transfer to IAM jobs were prejudiced by being excluded from the IAM unit. These matters require further clarification on remand, at the remedial phase.

races. See, *e.g.*, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 346 n.28 (1977) ("[A] seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption."). The question of who is responsible for injecting the racial element may well be significant in formulating relief.[8] But where, as here, it has been shown that racial considerations affected the design of the system, it follows that the aspects of the system that continue to effectuate that racial purpose are not bona fide.[9] Here, the court of appeals properly concluded that the IAM had, for racial reasons, caused certain jobs to be excluded from certain seniority units and placed in others. Those units continued to determine employees' rights after the effective date of Title VII.[10] This was sufficient to establish that not all aspects of the Bessemer seniority system were bona fide, and to require that an appropriate remedy be provided for the effects of the discriminatory aspects.

---

[8] In many cases, the relief can be designed to accommodate the congressional policy underlying Section 703(h). For example, the non-discriminatory aspects of the system, and the relative seniority among themselves of those who are not victims of discrimination, should be preserved if possible. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

[9] Indeed, those aspects of the seniority system are within the express terms of the proviso in Section 703(h): "provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *."

[10] Congress did not intend to allow an employer who continued an intentionally discriminatory employment practice past the effective date of Title VII to defend a claim by showing that the continuation was the result of inertia, not renewed racial animus. See 110 Cong. Rec. 7243 (1964) (remarks of Sen. Case) (employers are to bring their employment practices into conformity with Title VII during the period between the title's enactment and its effective date). Of course, the remedy can take into account only injuries suffered after the effective date.

Petitioners (see, *e.g.*, USW Br. 40, 44-46, 3a-4a; Pullman Br. 14) and the district court also defend the IAM's actions by saying that they were in compliance with NLRB orders. Their claim is not that the assignment of the disputed jobs was "consistent with National Labor Relations Board precedents" (see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 (1977)).[11] Instead, the district court relied on the NLRB's decision to certify particular units in the Bessemer plant (see Pet. App. 34a-38a).

The Board, however, merely certifies what it believes is *an* appropriate bargaining unit; often, there are several possible appropriate units. See, *e.g.*, *NLRB* v. *Chicago Health & Tennis Clubs*, 567 F.2d 331, 334-335 (7th Cir. 1977); *Wheeler-Van Label Co.* v. *NLRB*, 408 F.2d 613, 617 (2d Cir.), cert. denied, 396 U.S. 834 (1969); *Black & Decker Manufacturing Co.*, 147 N.L.R.B. 825 (1964). Thus the Board's certification of the IAM unit does not mean that the IAM's exclusion of certain jobs was necessarily required by the National Labor Relations Act. Moreover, the Board did, against the IAM's wishes, include in the IAM unit certain jobs which were held by blacks, and the IAM promptly divested itself of those jobs. It did so by an agreement with the USW and Pullman-Standard which the Board approved, but, as respondents point out (Resp. Br. 127-128 n.92), the Board is most unlikely to inquire into an agreement acceptable to all concerned parties if there is no complaint. Moreover, we are aware of nothing in the record suggesting that the Board knew that the agreement excluded all the blacks from the IAM unit. The Board's role in this case thus does not undermine the court of appeals' conclusion that, on the IAM's initiative, certain jobs were placed in certain bargaining (and therefore seniority) units not for legitimate purposes but in order to promote racial segregation.

---

[11] As we will explain (see pages 29-30 note 21, *infra*), that a system is based on bargaining units which comport with NLRB precedents does not necessarily mean that it is bona fide, although it is stronger evidence than NLRB designation of particular units.

II. THE TEST APPLIED BY THE COURTS BELOW IDENTIFIES PROPER CRITERIA FOR DETERMINING WHETHER A SENIORITY SYSTEM IS BONA FIDE

Both courts below relied on the definition of "bona fide" specified by the Fifth Circuit in *James*. See pages 4-5, *supra*. Other courts have used the *James* test as well. See, *e.g.*, *United States* v. *Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; *Sears* v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981), petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221; *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981). While the form of words used in the *James* definition is not entirely helpful, we believe that it essentially directs a court to make three inquiries,[12] and that these inquiries are proper ones for a court to undertake in determining whether a system is bona fide.

The first inquiry is whether the challenged aspects of the seniority system have a disproportionately harsh impact on minorities; such an impact may create an inference that those aspects are not bona fide. The nature and magnitude of the disproportionate impact determine the strength of the inference. The second inquiry is whether those who established the seniority system, or certain features of it—generally, an employer and one or more unions—have a history of practicing, or acquiescing in, racial discrimination. If they do, an inference that certain aspects of the system are not bona fide may be justified. But because Section 703(h) protects some seniority systems that were created at a time of per-

---

[12] The first factor—"whether the system *operates* to discourage all employees equally from transferring" (emphasis added)—appears to require an inquiry into disproportionate effects. The second and third factors (see pages 4-5, *supra*) refer to a background of discrimination and the business justification of the system. The final factor simply states the ultimate question of whether a discriminatory purpose entered into the design of the system.

vasive discrimination and have a disparate impact on minorities (see *International Brotherhood of Teamsters* v. *United States*, *supra*), the sponsors of a seniority system must be permitted to overcome an inference created by either of the first two inquiries by showing a sufficient non-racial business justification for the challenged aspects of the system.[13] The third inquiry is whether such a justification exists.

These inquiries parallel factors the Court has relied on in determining whether a governmental agency has violated the Equal Protection Clause by acting with a discriminatory intent, and the equal protection cases are a useful analogy. As we will explain, however, the issues are sufficiently different, and arise in such different contexts, that the principles developed for proving discrimination under the Equal Protection Clause may apply somewhat differently in determining whether a seniority system is bona fide.

A. Disproportionate impact

A seniority system, or particular features of it, may disproportionately affect minority employees in one of several ways. The IAM's maneuvers excluded every black from its seniority unit. A departmental seniority system might operate to deny blacks, but not whites, the opportunity to be promoted without losing their seniority. See pages 20-21, *infra*. Or certain aspects of a

---

[13] Because respondents established (see Pet. App. 26a-28a; USW Br. 8) that the seniority system perpetuated past discrimination (see *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 349-350, quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 429, 430 (1971)), the district court properly assigned to petitioners (see Pet. App. 25a) the burden of establishing the Section 703(h) affirmative defense. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (Section 703(h) exemption for certain tests is an affirmative defense that must be established by employer); *County of Washington* v. *Gunther*, No. 80-429 (June 8, 1981), slip op. 7-9 (Section 703(h) incorporates "affirmative defenses" of Equal Pay Act); *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 (1977) ("bona fide occupational qualification" exemption of Section 703(e)(1)—phrased similarly to Section 703(h)—must be proved by employer).

seniority system might discourage blacks from transferring out of the least desirable jobs. Of course, disproportionate impact cannot be considered in isolation, and only in a particularly "stark" case will it conclusively demonstrate that an aspect of a seniority system was adopted with a discriminatory purpose. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266. But in general, if an aspect of a seniority system "bears more heavily on one race than another" (*Washington* v. *Davis*, 426 U.S. 229, 242 (1976)), a court should be permitted to infer, subject to refutation, that that aspect was designed with race in mind and is therefore not protected by Section 703(h).[14]

1. A seniority system that explicitly differentiated between employees of different races would, of course, not be bona fide. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 355-356. But parties to a collective bargaining agreement who intend to discriminate are unlikely to use explicitly racial language; the danger is that they will use a subterfuge to achieve their ends. See *United States* v. *Board of School Commissioners*, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978). See also *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 135 (1976). In many cases, as in the present case, a subterfuge will be readily available, because many employers followed a policy of segregating occupations on the basis of race. In this way, job classifications provide a surrogate for race; parties intending to discriminate can simply treat "black" jobs differently from "white" jobs—as the IAM did—thus avoiding explicit racial classifications. Here there was other evidence of IAM's racial purposes, but often courts

[14] The strength of the inference will of course vary with the extent and nature of the impact. Where the challenged aspect of the seniority system affects all blacks and few whites, the inference that it was designed to discriminate against blacks will be relatively strong. Where, as in *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 356, large numbers of whites are also injured, the inference will be weaker. See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 275 (1979).

may be unable to detect such covert classifications unless they are free to compare the impact a challenged aspect of a seniority system has on blacks' jobs with its impact on whites' jobs, and draw an inference of discrimination if the impacts are severely disproportionate.

Local No. 84, IBEW v. *United States*, petition for cert. pending, No. 80-2117, which concerned the seniority system of the Georgia Power Company, is an example. See also *Miller* v. *Continental Can Co.*, 26 Fair Empl. Prac. Cas. 151 (S.D. Ga. 1981); *Myers* v. *Gilman Paper Co.*, 25 Fair Empl. Prac. Cas. 468 (S.D. Ga. 1981). Until 1963, Georgia Power assigned all black employees and no white employees to the jobs of laborer, porter, janitor, and maid—the lowest-paying jobs in the company—and did not permit blacks to transfer to any other positions. After 1963, and continuing beyond the effective date of Title VII, Georgia Power began allowing blacks to transfer to higher-paying jobs only if they met requirements that did not apply to other transfers within the company. At the same time, Georgia Power continued to assign almost all blacks to the lowest-paying jobs; some whites were assigned to jobs as laborers but none to the other three jobs, and those few whites were promoted to higher-paying positions far more quickly than blacks.

The Georgia Power seniority system established lines of progression through which employees could advance to higher-paying jobs without loss of seniority. But, unlike other jobs, the "black" jobs of laborer, janitor, porter and maid were not in lines of progression. Thus black employees could advance to higher-paying jobs only by transferring to a new section and forfeiting their seniority. Nearly all white employees, by contrast, could be promoted without losing their seniority.[15]

This kind of seniority system is explicitly neutral, but it limits the opportunities of those in certain jobs—the "black" jobs—far more severely than those of the holders of "white" jobs. In other words, such a system attaches

[15] These facts are drawn from our response to the petition in No. 80-2117.

special disadvantages to precisely those jobs which the employer has ensured will be held exclusively or primarily by blacks. Such a pattern may not conclusively demonstrate an intention to discriminate, but it is unrealistic to suppose that no inference of discrimination can be drawn from it. The principal evidence of such a covert classification—indeed, often the only evidence—will be a severely disproportionate impact.[16]

2. In cases dealing with the definition of discriminatory intent under the Equal Protection Clause, the Court has similarly recognized that disproportionate impact is an important consideration. See, *e.g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 273; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266; *Washington* v. *Davis*, *supra*, 426 U.S. at 241-242. These cases provide additional support for using disproportionate impact to determine whether aspects of a seniority system have been designed with a discriminatory purpose. For example, the racial impact of the IAM's maneuvers was so one-sided that, considered in context, it would compel the conclusion that the IAM was discriminatorily motivated according to the principles governing proof of discriminatory purpose under the Equal Protection Clause. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266; *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Moreover, in our view, disproportionate impact should be given somewhat greater weight in determining whether a challenged aspect of a seniority system was adopted with a discriminatory intent than it receives in the equal protection context.

---

[16] Here, the court of appeals also noted that the Bessemer seniority systems disproportionately affected blacks by confining them in "the least remunerative departments" (Pet. App. 10a). The court did not develop this conclusion, but this kind of disparate impact can also suggest that a system, or particular aspects of it, are intentionally discriminatory. See *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 n.25. In *Miller* v. *Continental Can Co.*, *supra*, for example, all the "black" jobs were in a seniority unit in which the highest position paid less than all but a few of the jobs in the other, exclusively white departments.

While the Title VII question and the Equal Protection Clause question are analogous, they differ in certain important respects. When a court holds that a government action had a discriminatory purpose, it is, in general, overturning a decision made by (or in accordance with the wishes of) elected officials. By contrast, a decision holding that certain aspects of a seniority system are not bona fide need not sweep away the entire system or otherwise work a major interference with the collective bargaining process. Such a decision only requires that aggrieved individuals be given a remedy equivalent to the seniority they would have had if race had not entered into the design of the system. See pages 9-10, 15 & note 8, *supra*. Thus the cost of an incorrect decision on the bona fides of an aspect of a seniority system cannot be compared to the cost of invalidating an act of a democratically-elected body. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 776-778 (1976).

Moreover, the factual context of an examination of a seniority system will typically be quite different. As we have explained, in this case and many others a seniority system was superimposed on a rigidly segregated pattern of employment practices, making covert classifications more of a danger than they are in society at large. The " 'heterogeneity' of the Nation's population"—one of the factors which "limit[s] [the] probative value of disproportionate impact" in constitutional cases (see *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266 n.15, quoting *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972)) will often not be reproduced on the shop floor.

Finally, if an aspect of a seniority system that has a disproportionate impact was adopted for a legitimate business purpose, it should be relatively easy for the sponsors of the system to explain that purpose, and there is nothing questionable in a court's requiring such an explanation. Compare *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (appropriateness of inquiring into reasons for actions "in a business setting")

with *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 268 n.18 ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government"). The public interest justifying a legislative or executive action will, however, often be a mix of the varying pressures and interests that produced a certain political outcome (see *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973)), making it difficult to articulate the precise justification for a measure. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265. For these reasons, the Court should be less reluctant to require a specific justification for an aspect of a seniority system that produces a significantly disproportionate impact than it is to require such a justification under the Equal Protection Clause.

B. A history of discrimination

The district court found that the USW was principally responsible for the Bessemer seniority system and that the USW did not have a history of racial discrimination; the court of appeals did not appear to disagree with the district court's assessment of the USW's history or doubt that the USW was responsible for portions of the seniority system, but it recognized that the organization of the seniority units was partly attributable to the IAM, and that the IAM clearly engaged in discriminatory practices. This reinforced the court of appeals' conclusion that to the extent the seniority system was the result of IAM's maneuvers, it was not bona fide. In our view, the courts were correct in giving great weight to the unions' history of discrimination or nondiscrimination.

1. A history of discrimination may illuminate a disproportionate impact and heighten the suggestion that that impact was desired. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 267. If an employer or union consistently discriminated in other areas related to employees' conditions, there is, at the very least, no reason to presume

that its contemporaneous support for seniority rules that severely disadvantage blacks is nondiscriminatory and undertaken for legitimate purposes. This is particularly true when a seniority system furthers precisely the same racially discriminatory objectives that an employer or union is pursuing through other means.

The IAM's actions are, of course, a clear example. The IAM engaged in judicially-noticeable discriminatory practices and, according to its "ritual," explicitly limited its membership to whites. It then attempted, in NLRB proceedings, to exclude blacks from its bargaining unit; when that failed, it ceded the blacks' jobs to the USW. It is abstractly possible that the IAM excluded the blacks because it genuinely believed their jobs did not belong in the bargaining unit; but it makes no sense to preclude at least an inference that the IAM excluded the blacks' jobs because they were held by blacks.[17] Thus, a court would be justified in inferring that the seniority system was part of a discriminatory plan (see Fed. R. Evid. 404(b) (evidence of other wrongs admissible to show common plan or design)), just as "given the purpose to operate a dual school system one [can] infer a connection between such a purpose and racial separation in other parts of the school system." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 467-468 (1979), citing *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973).

2. Moreover, if an employer or a union has shown an intention to discriminate on the basis of race, there is some reason to suspect that the result of collective bargaining will reflect that intention, unless the other party to the collective bargaining relationship resists or is willing to make concessions in order to protect minority employees against discrimination. Where one party to a

[17] The Georgia Power case (page 20, *supra*) provides a somewhat similar example of an employer with a history of discrimination. Georgia Power adopted a variety of unlawful devices—discriminatory hiring and transfer practices and requirements—to bar blacks from all but the lowest-paying jobs. The seniority system, by excluding those jobs from lines of progression, served exactly the same purpose.

collective bargaining agreement has a history of discriminating on the basis of race, therefore, it is not necessary to show that the other party also actively discriminated; even indifference to racial concerns may suggest that certain aspects of the seniority system were influenced by racial motivations.

Here, the district court concluded that Pullman-Standard, which of course engaged in widespread discrimination, did not have a substantial influence on the seniority system because "although certainly affected by the process of negotiation, the seniority system under attack is essentially the product of USW aims and policies" (Pet. App. 40a).[18] Because the USW did not pursue discriminatory objectives, the court concluded that there was no reason to draw an inference that the system was not bona fide. The court of appeals analyzed the readjustment of the units with the same principles in mind, but it recognized that certain aspects of the system were the result of the aims and policies of the discriminatory IAM, which the USW—"in the interest of increased membership"—did not resist (see Pet. App. 15a-16a). It accordingly, and correctly, drew the inference that those aspects were affected by race.[19]

---

[18] We do not endorse the district court's statement that in general "[a]lthough determined by collective bargaining, a seniority system may properly be viewed as the manifestation of a union objective, one which operates in opposition to and as a limitation upon the managerial powers sought by the company" (Pet. App. 40a). However true this is about the use of seniority as a criterion, there is no reason to suppose that it will be true of, for example, the division into seniority units. Indeed, elsewhere in its opinion, the district court explained the ways in which the departmental system at Bessemer was needed to serve certain management objectives. See Pet. App. 31a & n.7.

[19] Both petitioners agreed to the IAM's discriminatory maneuvers; although their complicity may have been passive, they appear to be liable for back pay. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Moreover, we know of no evidence that, after the effective date of Title VII, either petitioner "self-examine[d] and * * * self-evaluate[d] their employment practices and * * * endeavor[ed] to eliminate" the segregative elements that were present in the seniority system. See *ibid.*; *Terrell* v.

C. Business justification

1. A seniority system is bona fide to the extent that its design is the result of the legitimate, non-racial objectives of the employer and the employees, generally represented by the union. Superficially, then, it might seem that the most straightforward way to defend the bona fides of a challenged aspect of a seniority system would be to show its connection to legitimate business purposes.

Here, the district court attempted, to a degree, to analyze the system in this way, by examining the particular requirements of the enterprise and the qualifications of employees in various occupations. See Pet. App. 31a-32a. But this approach has obvious limitations. It often requires more expertise than is available to a court. Moreover, the parties defending a seniority system will usually be able to offer some explanation for various aspects of the system; rarely will a system consist of a "helter skelter arrangement of seniority units" that can be explained only as having been "purposely molded to discriminate against black workers." See *Myers* v. *Gilman Paper Co.*, *supra*, 25 Fair Empl. Prac. Cas. at 474. Indeed, as the district court recognized (Pet. App. 31a-32a), it is not always clear what constitutes a legitimate explanation. In any but an extreme case, for example, it would be difficult for a court to reject the arguments of a craft union and an employer that a particular job in a particular plant did not belong in the craft unit; but those arguments might well be a rationalization for racial discrimination.

For these reasons, the courts below considered "industry practice" as well (see *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 356). Both the district court (Pet. App. 35a-36a) and the court of appeals (Pet. App. 11a) correctly compared Pullman-Standard's Bessemer plant to two northern Pullman-Standard plants which had a somewhat comparable range

---

United States Pipe & Foundry Co., 644 F.2d 1112, 1120-1121 (5th Cir. 1981); *James* v. *Stockham Valves & Fittings Co.*, *supra*, 559 F.2d at 353-354.

of operations but a very small number of black employees. Both courts relied on the premise that racial considerations could not have affected the organization of the northern plants; thus aspects of the Bessemer seniority system which resembled those of the northern plants were very unlikely to have a racial motivation, while differences in the Bessemer plant required some further justification—a justification which the court of appeals did not find.

2. The district court, however, considered other forms of "industry practice" which, we believe, either are of very limited probative value or must be used with great care. For example, it is possible that industry practice will itself be based on discrimination. *United Transportation Union* v. *Sears*, petition for cert. pending, No. 81-221, is a particularly dramatic example.

Sears involved a railroad's seniority system, in which there were essentially two seniority units; one consisted of brakemen and several other crafts, the other of porters and chair-car attendants. See 81-221 Pet. App. A-3 to A-4, A-12. Because of hiring discrimination both before and after the effective date of Title VII, all porters and chair-car attendants were black; the other crafts were either predominantly or entirely white. This craft organization along racial lines had apparently prevailed throughout the railroad industry since the nineteenth century. See *id.* at A-3. During almost this entire period, however, porters performed essentially the same braking duties as passenger train brakemen, along with additional duties in attending to the passengers. *Id.* at A-3, A-13. A black wishing to become a porter had to pass the same rules examination as a white wishing to become a brakeman. *Id.* at A-4.[20]

[20] This Court, discussing the craft organization of the railroad industry in a related context, indicated that the only difference between the jobs of "brakeman" and "porter" were their names and the color of the persons permitted to hold them. *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 770-771 (1952). The Court explained:

> "[T]rain porters" do all the work of brakemen; * * * the government administrator of railroads during World War I

Since the only difference between porters and brakemen was their race, race was the only possible explanation for the exclusion of porters from the seniority unit that permitted transfers to other jobs without loss of seniority. Necessarily, then, this aspect of the seniority system was not bona fide. The union held liable in *Sears* emphasizes, in its petition for a writ of certiorari, that the seniority system followed traditional industry craft lines. See, *e.g.*, 80-221 Pet. 15. But where the crafts were defined in racial terms—"porter" was essentially the name given to a black brakeman (see *Brotherhood of Railroad Trainmen* v. *Howard*, *supra*, 343 U.S. at 773)—this "industry practice" obviously cannot show that the distinction between crafts was bona fide.

The racial basis of the distinction between crafts will seldom be as clear as it was in the railroad industry. But in view of the consistent exclusion of blacks from crafts—an exclusion which is "a proper subject for judicial notice" (*United Steelworkers of America* v. *Weber*, 443 U.S. 193, 198 n.1 (1979))—the fact that seniority departments follow industry-wide craft lines cannot provide assurance that the departments are not based, in part, on race. As in the railroad industry, black employees performing the same work might by placed in jobs that are given different names and then excluded from the "craft"—solely because of their race. Even where this is not the case, the pattern apparent in the IAM's actions in this case—a craft union which excluded blacks from its membership for discriminatory reasons very likely had the same reason for seeking a seniority system that discouraged blacks from transferring into jobs within the craft—appears elsewhere. *Terrell* v.

---

had classified them as brakemen and had required that they be paid just like white brakemen; * * * [but] when the railroads went back to their owners, they redesignated these [black] brakemen as "train porters," "left their duties untouched," and forced them to accept wages far below those of white "brakemen" * * *.

Id. at 770-771 (footnote omitted).

United States Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981), seems to be an example; there the court of appeals held that all-white craft unions attempted to define bargaining units in a way that would exclude blacks and then insisted on a seniority system based on the bargaining units. See *id.* at 1118-1119. The resulting system followed craft lines; but that alone was plainly an insufficient basis to hold that it was bona fide.[21]

---

[21] For similar reasons, conformity with the precedents of the NLRB or a comparable agency does not necessarily show that a unit is bona fide. In *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 356, where the Court mentioned Board precedents as a factor to be considered, it explained that the relevant precedents in that case were based on the "different duties and functions, separate supervision, and different bases of payment" that made the units "functionally distinct groups with * * * divergent interests" (*id.* at 356 n.42, quoting *Georgia Highway Express*, 150 N.L.R.B. 1649, 1651 (1965)). Sometimes, however, NLRB guidelines may fail to prevent employers', employees', and unions' discrimination from influencing the composition of a bargaining unit. For example, the Board will give some weight to traditional craft organization in an industry (see generally *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966)), which, as we have said, may be based in part on race. The railway craft units of brakeman and porter had been recognized by the National Mediation Board under the Railway Labor Act, even though they were based on race (see 80-221 Pet. App. A-12, A-69). That a federal agency was willing to recognize traditional craft or unit distinctions, even though they were based on race, at a time when private discrimination may have been legal, does not entitle a union or employer to continue to allow those distinctions to determine employees' seniority rights after the effective date of Title VII.

In any event, petitioners here do not assert that the boundaries of the IAM unit conformed to consistent NLRB practice; their claim is only that the Board designated the particular IAM unit at the Bessemer plant. As we explained (see page 15-16, *supra*), a unit designation in a particular case is less probative of bona fides than NLRB practice, and the Board's designation did not establish that the form of the IAM unit was dictated by the National Labor Relations Act. In addition, the Board sometimes explicitly considers employee preferences in designating bargaining units, holding elections among employees with a particular skill to determine if they are to be placed in a separate bargaining unit. See generally *Parke Davis & Co.*, 173 N.L.R.B. 313 (1968); *Globe*

CONCLUSION

The judgment of the court of appeals, insofar as it holds that certain aspects of the seniority system are not bona fide for the reasons discussed in this brief, should be affirmed.

REX E. LEE
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
DAVID A. STRAUSS
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
MARIE E. KLIMESZ
Attorneys

CONSTANCE L. DUPRE
Acting General Counsel
PHILIP B. SKLOVER
Acting Associate General Counsel
VELLA M. FINK
Assistant General Counsel
SUSAN BUCKINGHAM REILLY
Attorney
Equal Employment Opportunity Commission

OCTOBER 1981

Machine & Stamping Co., 3 N.L.R.B. 294 (1937). Such elections were held in the plant involved in *Terrell* v. *United States Pipe & Foundry Co.*, *supra*. See *United States Pipe & Foundry Co.*, 19 N.L.R.B. 1016 (1940); *United States Pipe & Foundry Co.*, 84 N.L.R.B. 954 (1949). The elections resulted in the creation of five predominantly white craft units and one predominantly black unit. The district court and the court of appeals agreed that the elections were significantly influenced by race. See 644 F.2d at 1117. At the insistence of the white craft unions, these bargaining units were also seniority units. See *id.* at 1116. In this way, the design of the seniority system may be directly attributable to the racial prejudices of the employees, expressed through the election. Whatever the merits of the particular system at issue in *Terrell*, this further shows that NLRB certification of a bargaining unit does not make the use of that unit bona fide for seniority purposes.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 [illegible]